86-830

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC., CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit has improperly fostered or required unfair and burdensome administrative procedures by holding that FCC applicants must make allegations of anticompetitive harm *before* consummation of the business transactions that create the potential for such harm.

2. Whether the D.C. Circuit may lawfully refuse to review the public-interest emptiness of a particular FCC licensing decision merely because no party had sought judicial review of the rulemaking establishing the comparative rules, procedures, and policies.

LIST OF PARTIES

and

RULE 28.1 LIST

No parties other than those in the caption appeared in the proceedings in the court below.[1]

The parent company of Petitioner Celcom Communications Corporation of Pennsylvania is Associated Communications Corporation.[2]

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[1] MCI Cellular Telephone Company and Unity Telecommunications Systems, Inc. also participated in the proceedings at the Federal Communications Commission.

[2] The owners of Respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS") are Lin Broadcasting Inc., which owns 51 percent of AWACS' stock, and Metromedia, Inc., which owns 49 percent. Respondent Cellular Mobile Systems of Pennsylvania, Inc., is a wholly owned subsidiary of Graphic Scanning Corporation.

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Petitioner Celcom Communications Corporation of Pennsylvania ("Celcom") respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit (entered on June 10, 1986, as modified June 30, 1986) and that court's judgment and order denying Celcom's petition for rehearing (entered on August 25, 1986).

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (*per curiam*; Mikva, Edwards and Scalia, JJ.), is reported at 792 F.2d 239 (reprinted in Appendix A, pp. 1a-6a, *infra*, as it was entered on June

10, 1986). The order of the court amending the opinion *sua sponte* on June 30, 1986, is reprinted in Appendix B, p. 7a, *infra*. The Court of Appeals affirmed the Final Decision of the Federal Communications Commission ("FCC") released on January 8, 1985, reported at 103 F.C.C.2d 282 (reprinted in Appendix C, pp. 8a-40a, *infra*), and the FCC's Memorandum Opinion and Order denying Celcom's petition for agency reconsideration, unofficially reported at 58 Rad. Reg. 2d (P&F) 1132 (August 22, 1985) (reprinted in Appendix D, pp. 41a-49a, *infra*).

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 10, 1986. Celcom's timely petition for rehearing was denied by order and judgment entered on August 25, 1986 (reprinted in Appendix E, p. 50a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 309 and 402 of the Communications Act of 1934, 47 U.S.C. §§ 309, 402, as amended, appear in Appendix G, pp. 65a-74a, *infra*.

STATEMENT OF THE CASE

This case arises from the D.C. Circuit's affirmance of the FCC's award of a cellular radio telephone license for the Philadelphia market to respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS") instead of to petitioner Celcom.[1]

A cellular radio telephone system permits users of the system to make and receive telephone calls from mobile units. The cellular radio telephone technology involves (1) a network of fixed radio transmitting and receiving

[1] The D.C. Circuit had jurisdiction of Celcom's appeal pursuant to 47 U.S.C. § 402(b).

stations, each serving its own geographic area (a so-called "cell"), and (2) numerous mobile units that typically are located in motor vehicles or are hand carried. Through the use of computerized switches, mobile units transmit to, or receive from, the fixed station in the "cell" in which they are located at the time of transmission, and the entire cellular radio system is interconnected with the landline telephone network. The new and emerging cellular technology is a substantial improvement over previous mobile telephone service. *See MCI Cellular Tel. Co.* v. *FCC*, 738 F.2d 1322, 1324 (D.C. Cir. 1984).

The FCC decided to allow two cellular systems in each geographic market. Frequencies for one system were set aside for a "wireline" (local conventional telephone) operator. Frequencies for the other system were set aside for a "nonwireline" operator (entities other than local conventional telephone systems). *Cellular Communications Systems*, 86 F.C.C.2d 469 (1981), *modified*, 89 F.C.C.2d 58 (1982), *further modified*, 90 F.C.C.2d 571 (1982) *pet. for review dism'd sub nom. United States* v. *FCC*, No. 81-1526 (D.C. Cir. Mar. 3, 1983) (*"Cellular Systems"*). The instant case involves the license for frequencies reserved for a nonwireline operator in Philadelphia.

Two questions worthy of this Court's review are presented. For clarity, the Statement of the Case separately presents the facts relevant to each question.

I. Question One arises from the holding of the D.C. Circuit that petitioner Celcom should have raised an anticompetitive dangers issue against the winning applicant, respondent AWACS, *before* the business transaction that threatened to produce those dangers had been consummated. This novel doctrine of administrative procedure, not relied upon by the FCC, places litigants in an unfair "Catch-22" situation, is burdensome to litigants and agencies alike, and will have adverse consequences for myriad proceedings unless overturned.

When AWACS filed its Philadelphia cellular application in June, 1982, it was a joint venture composed of

three venturers. Lin Broadcasting Inc. ("Lin") owned 51 percent of AWACS' stock, but was required by the joint venture agreement to collaborate closely in the operation of the Philadelphia cellular business on important management questions with Metromedia, Inc. ("Metromedia"), which owned 25 percent of AWACS' stock. The third venturer, Radio Broadcasting Company ("RBC"), owned 24 percent of AWACS' stock, but had only a passive role in the management of AWACS. Celcom Mot. to Reopen Record, p. 2 (Jan. 3, 1984).

AWACS' application revealed that Metromedia *planned* to acquire RBC, the major provider of radio paging services in the Philadelphia market. Lin, the third venturer in AWACS, was then also seeking radio paging interests in the same market.[2]

Metromedia's *planned* acquisition of RBC remained pending and unconsummated for many months. Although approved by the FCC in March, 1983, notice of its consummation was not given until December 3, 1983. This was almost eighteen months after AWACS' application was filed in this proceeding. Indeed, it was *after* the initial decision, *after* the parties had filed their exceptions to the initial decision, and only three days before the deadline for reply exceptions in this proceeding. *See* Celcom Pet. for Reh'g, p. 3 (July 25, 1986).

Within 30 days of notice of consummation of the Metromedia/RBC transaction, Celcom filed a motion to reopen the record so that the FCC could address the substantial anticompetitive dangers relevant to the comparison of cellular applicants alleged to flow from Metromedia's ownership of RBC's paging business. Celcom alleged that by acquiring RBC, Metromedia immediately became the dominant force in the Philadelphia radio pag-

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[2] RBC had 60% of the Philadelphia paging market. Radio Broadcasting Co., FCC 83T-2, at 3 (Feb. 11, 1983).

ing market.[3] Because the AWACS agreement required close collaboration in the cellular business between Lin and Metromedia, grant of AWACS' cellular application would place a major paging competitor (Metromedia) in a position of close collaboration with a major potential paging competitor (Lin) in the same city. This collaboration, Celcom argued, would reduce the potential for vigorous competition in the Philadelphia radio paging market. *See United States* v. *Penn-Olin Co.*, 378 U.S. 158, 169 (1964). Regardless of whether the joint venture violated the antitrust laws, Celcom contended it raised anticompetitive concerns that at least had to be weighed in the comparative evaluation of the competing Philadelphia cellular applicants under the FCC's broad public interest standard. Celcom Mot. to Reopen Record, pp. 2-5, 6 & n.1 (Jan. 3, 1984).

The FCC's Final Decision denied Celcom's motion *a year after* its filing. The FCC noted its earlier approval (in a separate proceeding) of Metromedia's application to acquire RBC, observed that "Celcom did not object to the Metromedia acquisition," and thus termed Celcom's motion to reopen "both late and filed in the improper forum." (A. 38a.) Celcom appealed to the D.C. Circuit under 47 U.S.C. § 402(b).

Shortly before oral argument at the D.C. Circuit in this Philadelphia case, another panel of the D.C. Circuit remanded the cellular licensing case for the New York market with directions that the FCC consider a parallel argument concerning competitive dangers in the New York market, where Lin and Metromedia were also cellular radio joint venturers as well as ostensible radio paging competitors. *Celcom Communications Corp.* v. *FCC*,

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[3] Radio paging is "[a] one-way communications service from a base station to mobile or fixed receivers that provide signaling . . . by such means as tone, tone-voice, tactile, optical readout, etc." 47 C.F.R. § 90.7. A mobile paging receiver is commonly known as a "beeper." 47 C.F.R. § 22.2. To a degree radio paging can be a lower-cost alternative to cellular mobile telephone communications.

789 F.2d 67 (D.C. Cir. 1986) ("*New York*"). The D.C. Circuit held in *New York* that the FCC was required more thoroughly to consider these anticompetitive arguments in reaching its licensing decision.[4]

In this Philadelphia case, however, the D.C. Circuit refused to remand as it had in *New York*. The court's decision did not seek to distinguish between the substance of the anticompetitive issues in *New York* and here. Instead, the court simply noted that in *New York* Celcom's affiliate had raised the issue "in its exceptions," whereas in this Philadelphia case,

> Celcom raised the issue *after* the FCC had issued its Final Decision. Because Celcom easily could have raised this issue at an earlier stage in the proceeding, we affirm the Commission's conclusion that Celcom's request to reopen the record was untimely. [A. 6a.]

The Court of Appeals was mistaken. Celcom in fact had filed its motion to reopen over a year *before* the FCC's Final Decision. When FCC counsel so informed the court, it did not change its holding but merely amended its opinion to state that Celcom had waited until after "Exceptions and Reply Exceptions" had been filed. (A. 7a.)

Celcom timely sought rehearing of this holding in the Court of Appeals on two grounds. *First*, the court's holding rested on a rationale that had not been the FCC's rationale. *Second*, to require raising the question of the effect *on this Philadelphia comparative case* of the anticompetitive consequences of Metromedia's acquisition of RBC *before that acquisition had been consummated* would be to foster or require a system of speculative pleadings

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[4] On remand, the FCC again rejected the allegations of anticompetitive harm, erroneously in Celcom's view. Celcom Commun. Corp., CC Docket No. 83-101, FCC 86-423 (Oct. 16, 1986), *notice of appeal filed sub nom.* Celcom Commun. Corp. v. FCC, No. 86-1621 (D.C. Cir. Nov. 14, 1986).

that would produce a procedural quagmire with mischievous consequences for FCC proceedings and those of other administrative agencies. To require parties to address the significance of matters that are still uncertain ever to occur, Celcom argued, would expose future agency proceedings to burdensome and unneeded litigation about the contingent and supposititious. Celcom Pet. for Reh'g (July 25, 1986). The court denied Celcom's petition for rehearing without opinion on August 25, 1986. (A. 50a.)

II. Question Two arises from the refusal of the D. C. Circuit to consider the merits of Celcom's argument that the FCC's cellular comparative hearing rules, procedures and policies, *as they were being applied to this Philadelphia case*, were inadequate or unsuited for resolving which applicant would be best qualified to serve the public interest, with the result that the FCC's comparative decision in this case had become unmoored from the "public interest" standard prescribed by 47 U.S.C. § 309. The apparent rationale of the Court of Appeals was that Celcom had not sought review of the earlier FCC rulemaking decision establishing the cellular comparative hearing rules, procedures and policies and so could not later challenge them. The D.C. Circuit's rationale is inconsistent with fundamental principles enunciated by this Court concerning the reviewability of the lawfulness of agency rules, procedures and policies when they are applied to particular cases and is contrary to the FCC's public interest mandate.

In May, 1981, the FCC had adopted rules, policies and procedures for choosing among applicants for cellular telephone licenses through comparative hearing procedures. *Cellular Systems, supra*, 86 F.C.C.2d 469. Applicants for the licenses in the thirty largest markets in the country, including Philadelphia, filed their applications on June 7, 1982. The competing applications for each market were designated for hearing before an administrative law judge ("ALJ"). In all of these cases the applications were

designated for hearing on four comparative issues: (a) area and population covered; (b) expansion proposals; (c) other service proposals; and (d) a composite determination of "what disposition of the referenced applications would best serve the public interest, convenience and necessity."

The first two cases to complete the process before ALJs and reach the full Commission involved the Chicago and Pittsburgh markets. The FCC's decisions in those cases were notable for the doubts they expressed about the FCC's ability to determine through the comparative hearing process which applicant would, *in reality*, provide the best system to serve the "public interest." [5] The FCC stated that "the inherent flexibility of the cellular concept would allow any of the applicants to reconfigure its system in order to meet the requirements of the marketplace," and that there existed a "likelihood that substantial modifications will be made in the proposed system when it is built." 96 F.C.C.2d at 1017-18; *see id.* at 1174 & n.5. The FCC recognized the artificiality of a comparative hearing process that was based upon a comparison of promises that need never be fulfilled when it stated that "the system designed to win the license may not be the system designed to serve the public." 96 F.C.C. 2d at 1018 n.5, 1174 n.5.[6]

Shortly after deciding the Pittsburgh and Chicago cases, the FCC decided to jettison the comparative hear-

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[5] Rogers Radiocall, Inc., 98 F.C.C.2d 1172 (1984), *recon. denied*, 96 F.C.C.2d 1293 (1984), *aff'd sub nom.* Cellular Mobile Systems of Illinois, Inc. v. FCC, 782 F.2d 214 (D.C. Cir. 1986); MCI Cellular Telephone Co., 96 F.C.C.2d 1015 (1984), *recon. denied*, 98 F.C.C.2d 1274 (1984), *aff'd sub nom.* Cellular Mobile Systems of Pennsylvania, Inc. v. FCC, 782 F.2d 182 (D.C. Cir. 1985).

[6] In a separate opinion, Commissioner Quello observed that the Commission was "denigrating the comparative process" and "undermining its own objective by casting doubt as to the efficacy of that same process." 96 F.C.C.2d at 1037.

ing process for all cellular markets other than the thirty largest, and to award those other licenses by lottery. *Report and Order*, 98 F.C.C.2d 175 (1984), *modified*, 101 F.C.C.2d 577 (1985). In its lottery decision the FCC restated its "dissatisfaction" with the comparative hearing process, finding it "ill suited" for comparing alternative approaches to cellular design. 98 F.C.C.2d at 186 & n.35. The Commission enumerated "several weaknesses inherent in the comparative process which limit its utility in predicting who will be the best cellular system operator." *Id.* at 186. These included "its lack of comprehensiveness, inadequacy of information, absence of an agreed-upon evaluation system, reliance on assumption and simplification, and problems of promise versus performance," all of which made it "difficult" to observe a "standard of reasoned decision-making." *Id.* at 186-87 (footnote omitted). The Commission concluded that "[a] lottery procedure for cellular service can be expected to speed licensing of cellular radio service *with no identifiable reduction in the quality of service to be provided.*" *Id.* at 179 (emphasis added).[7]

The FCC's subsequent Final Decision in this Philadelphia case affirmed the ALJ's grant of the AWACS application and the denial of the applications of Celcom and two other applicants. The grant to AWACS rested on three preferences. First, AWACS was preferred, not for the coverage of its proposed system, but for the supposed reliability and market-specific nature of its market research studies. (A. 18a.) Second, AWACS' "ability to accommodate demand" was found superior because the AWACS system design was "based on the results of its market research." (A. 22a.) The FCC did not, however, compare the applicants' "system designs" themselves. Finally, AWACS was preferred for its "expansion plans"

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[7] The FCC declined to extend the lottery procedure to the 30 largest markets, including Philadelphia, as comparative licensing cases for those markets were already well underway. 98 F.C.C.2d at 179 n.12.

because these were found to have been "based on its generally superior assessment of demand." (A. 28a.) In other words, all of AWACS' preferences related to market research, which was not a principal aspect of any of the designated comparative issues. Indeed, the decisional criteria actually employed bore little relationship to those originally mandated by the FCC.[8]

On appeal to the D.C. Circuit, Celcom argued that the grounds for selecting AWACS had nothing to do with the "public interest, convenience and necessity" standard established by 47 U.S.C. § 309(a). Celcom urged before the court: (1) that the FCC had been making clear that it expected cellular systems as actually constructed to depart substantially from the application proposals, because the scope and nature of actual services would best be dictated by actual circumstances encountered in the marketplace rather than by the application proposals; (2) that the FCC had encouraged departures from application proposals by giving cellular operators nearly unregulated freedom to modify their systems *after* the grant of construction permits; (3) that because the FCC did not expect and would not require application proposals to be implemented, the comparative decision based on such application proposals lacked rational connection to actual cellular operations, actual service to the public, or any matter of regulatory concern; and (4) that the preferences awarded to AWACS thus had no nexus with the statutory requirement that applications be granted on the basis of "public interest, convenience and necessity." Celcom App. Br., pp. 20-29.

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[8] The FCC originally stated that "the geographic area that an applicant proposes to serve" would be "a major basis of comparison," that "[t]he second major comparative factor" would be "the applicant's ability to expand its system capacity in a coordinated manner," and that other factors such as rates, practices, proposed facilities and maintenance proposals would "generally be less significant." *Cellular Systems, supra,* 86 F.C.C.2d at 502-03. *See* n.16 *infra.*

The Court of Appeals did not separately address this Celcom argument. Instead, it rejected it as one of a number of "issues that have already been resolved in previous cellular telephone appeals or otherwise are without merit," citing in a footnote four prior D.C. Circuit decisions dealing with cellular comparative hearings. (A. 3a) (footnote omitted).

The cited decision that the court apparently believed disposed of Celcom's argument was *Celcom Communications Corporation of Georgia* v. *FCC*, 787 F.2d 609 (D.C. Cir. 1986), reprinted in Appendix F, pp. 51a-64a *infra* ("*Atlanta*"). There, the court rejected a similar challenge to the FCC's award of a preference in the Atlanta market.[9] The court in *Atlanta* had noted the argument that "the deregulation, as it were, of cellular coverage," leaving the cellular licensee free to "alter" its actual coverage, "sapped the comparative criteria of any meaningful public-interest content." (A. 54a.) But the *Atlanta* court concluded that "Celcom's criticism in this respect ultimately reduces to an attack on the comparative criterion itself," and that Celcom had not availed itself of its earlier "opportunity" to question the criteria in the FCC's rulemaking.[10] (A. 55a.) Accordingly, the Court of Appeals here apparently accepted the ruling in the *Atlanta* case that "[i]t is simply too late in the day to attack the comparative process itself or a comparative criterion which went unchallenged at the time it was adopted." *Id.*

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[9] None of the other three decisions cited by the court, Celcom Communications Corp. v. FCC, 789 F.2d 67 (D.C. Cir. 1986) ("*New York*"); Cellular Mobile Systems of Illinois, Inc. v. FCC, 782 F.2d 214 (D.C. Cir. 1986) (Chicago proceeding); or Cellular Mobile Systems of Pennsylvania, Inc. v. FCC, 782 F.2d 182 (D.C. Cir. 1985) (Pittsburgh proceeding), discussed the substance of the instant arguments.

[10] The court stated that Celcom had had such opportunity "in *Cellular Rulemaking* itself; in the several Reconsiderations and on appeal to this court from that rulemaking; on appeal to the Commission of the Designation Order in this proceeding; or in a motion before the agency to expand the issues." (A. 55a.)

REASONS FOR GRANTING THE WRIT

1. The Court Needs to Exercise its Supervisory Powers to Overrule the D.C. Circuit's Requiring or Fostering Unfair and Burdensome Administrative Agency Procedures by Holding that an Anticompetitive Issue Must be Raised *Before* Consummation of the Business Transaction that Gives Rise to that Issue.

The Court of Appeals has required or fostered an unfair "Catch-22" procedure in administrative agency adjudications that is burdensome both to litigants and to the administrative process.

The D.C. Circuit did not dispute Celcom's claim that the anticompetitive dangers of the AWACS joint venture were cognizable under the public interest standard in this comparative licensing case.[11] However, in "affirm[ing] the Commission's conclusion that Celcom's request to reopen the record was untimely" (A. 6a), the D.C. Circuit established or fostered an improper, confusing, and mischievous procedure for administrative agencies that this Court should reject in the exercise of its supervisory powers over Courts of Appeals.[12]

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[11] Indeed, another panel of the same court had only recently remanded the *New York* cellular case to the FCC to address nearly identical problems involving the same principal parties. *New York*, *supra*, 789 F.2d at 70-71. Moreover, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest." FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953), *citing* McLean Trucking Co. v. United States, 321 U.S. 67, 86-88 (1944).

[12] The D.C. Circuit erred when it purported to "affirm" a "conclusion" that the FCC had never reached. The FCC had not based its decision on the trivial distinction between raising the anticompetitive issue in exceptions and raising it shortly after reply exceptions. Instead, the FCC had ruled that Celcom was "late and in the improper forum" because Celcom had not raised the anticompetitive issue by "object[ing] to the Metromedia acquisition" in the entirely separate Commission proceeding having to do with Metromedia's acquisition of RBC but having nothing to do with the

In essence, the D.C. Circuit has notified agencies and the litigants before them that a litigant will lose entirely its right to raise an issue if it waits until the events giving rise to the issue have actually occurred. Litigants have been instructed that they must instead seek to raise an issue at some indefinite stage when it is still uncertain whether the events necessary to create a perceived problem will ever actually occur. The Court of Appeals thereby has created, perhaps unwittingly, far-reaching and adverse consequences for future proceedings before the FCC and administrative agencies generally.

In concluding that Celcom should have raised the anticompetitive issue earlier than it had, the Court of Appeals was clearly holding that Celcom should have raised the anticompetitive matter *before* Metromedia had actually consummated its purchase of RBC. But until its

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comparative evaluation of the Philadelphia cellular applicants. (A. 38a.)

The FCC's theory is baseless. Celcom had no standing to participate in the RBC acquisition case. Celcom could not, in the context of Metromedia's application for FCC consent to its acquisition of RBC, urge the imposition of a comparative demerit against AWACS in the Philadelphia cellular proceeding. Such a request had to be made in the Philadelphia cellular proceeding, and was. Problems of standing aside, the Commission would likely have rejected in the RBC acquisition case any claim regarding the anticompetitive effects of the AWACS application in the Philadelphia cellular case (i) as premature in terms of Philadelphia cellular matters, (ii) as raised in the wrong case, or (iii) as "speculative" (as the FCC found when it addressed the same issue in *New York*). *See* Alexander S. Klein, Jr., *infra* n.13, 69 F.C.C.2d at 2138 (contingent applications too speculative to warrant agency consideration). The D.C. Circuit was thus understandably unable to "affirm" the FCC's actual rationale. But it was wholly improper for the Court of Appeals to substitute its own procedural rationale for the FCC's rationale. *See* FCC v. Schreiber, 381 U.S. 279, 290 (1965) ("to permit . . . courts to establish administrative procedures *de novo* would, of course, render nugatory Congress' effort to ensure that administrative procedures be designed by those most familiar with the regulatory problems involved.").

consummation the RBC acquisition by Metromedia was simply a *proposed* business transaction. The financial press regularly reports numerous business deals that are announced or approved but never completed, thus bearing witness to the truism that "the game is not over until it is over." In any event, the strong uncertainty of Metromedia's consummation of the RBC acquisition is suggested by the length of time (nine months) that passed between the FCC's approval of the proposed transaction and the announcement of its consummation.

The practical effect of the D.C. Circuit's decision will be to force all parties in FCC comparative hearings, and in similar agency proceedings, to seek to interject the perceived effects of potential transactions into such proceedings while the transactions remain inchoate or risk being found tardy if they wait to raise an issue until the transaction giving rise to it is actually consummated. The D.C. Circuit's approach to agency procedure, if followed in other cases, will create chaos in agency proceedings, as it will force litigants to present, and force agencies to consider, all manner of contingent, hypothetical and speculative matters, based on "planned" transactions that may never occur.[13]

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[13] Because of the administrative burdens of attempting to address the significance of yet-uncompleted or hypothetical events, the FCC has in similar circumstances refused to consider such matters as being "speculative" or "premature." *See, e.g.*, Ottumwa Broadcasting Co., 92 F.C.C.2d 1011, 1017 (Rev. Bd. 1982) (allegations regarding financial qualifications based on pending lawsuit found to be "speculative and premature"); RKO General, Inc., 89 F.C.C.2d 297, 336 (1982) (refusing to consider contentions about fraud and mismanagement growing out of private contractual dispute, finding it "more appropriate to await the outcome of the litigation before deciding whether any action . . . would be warranted"); Alexander S. Klein, Jr., 69 F.C.C.2d 2134, 2138 (Rev. Bd. 1978) (noting general FCC rule that "pending applications for transfer of control or assignment will not be recognized in comparative hearings"), *aff'd*, 49 R.R.2d (P&F) 606 (1981); WMT-TV, Inc., 20 F.C.C.2d

The D.C. Circuit's approach to timeliness is unfair to parties in agency proceedings by threatening to penalize them for guessing wrong as to whether hypothetical or contingent future events might occur and thus impelling them to plead before the fact. Moreover, this approach creates an undesirably favorable environment within which agencies may seek to duck consideration of important issues going to the heart of the public interest standard governing agency proceedings. For it is apparent that agencies will have expanded capacity to claim that pleadings based on an uncompleted transaction are premature and speculative while also being able to claim that pleadings based on a completed transaction are tardy, with the underlying substantive issue never addressed.

As applied to the facts of this case, the D.C. Circuit's holding means that Celcom should have asked the FCC or the ALJ to assess AWACS some form of "contingent demerit" because of Metromedia's *proposed* acquisition of RBC. Any such demerit would have had to have been conditioned on future events. If the RBC acquisition were actually consummated, then the demerit would become "final," but if the deal came undone, then the demerit would be erased. And if the deal were restructured, the FCC would have to reopen the record to reevaluate the nature and extent of the demerit. The administrative burdens, both on parties and agencies, of making such decisions are obvious, unnecessary, undesirable, and should be avoided.

601, 602 (1969) (refusing to grant nonduplication condition in favor of party which was still negotiating for a network affiliation: "The situation is . . . too uncertain and speculative . . .. If [the party] obtains a network affiliation, it may, at that time, renew its request . . .."); Hi-Point Broadcasting Co., 14 F.C.C.2d 365, 366 (Rev. Bd. 1968) ("in making its [comparative] diversification determinations, it is the Commission's policy not to take account of applicants' other pending applications"). The D.C. Circuit's procedural rule is at odds with these agency decisions.

Because its rationale will place unacceptable burdens on the administrative process, as well as be unfair to litigants, the D.C. Circuit has so far departed from the accepted course of judicial proceedings as to call for this Court to exercise its power of supervision.

2. The Court Needs to Exercise its Supervisory Powers to Overrule the D.C. Circuit's Determination that Availability of Opportunity for Judicial Review of a Rulemaking Decision Adopting Rules, Procedures and Policies Precludes Later Appeal from Unlawful Agency Application of those Rules, Procedures and Policies at the Comparative Licensing Stage.

The Court of Appeals has erroneously ruled that a party may not have judicial review of the specific application of agency rules, regulations and policies in a licensing proceeding, if those rules, regulations and policies were not challenged when originally promulgated, even if the party's grievance is not with the rules, regulations and policies themselves but only with their specific application in the party's licensing proceeding.

Cellular radio licensing proceedings are similar to many other proceedings before the FCC and other agencies. Governing statutes typically grant agencies broad authority to regulate in accord with the "public interest, convenience and necessity". Here, the FCC was obligated to award licenses for an important new communications service, with huge potential economic and public interest significance, in accordance with the public interest standard of 47 U.S.C. § 309(a).[14]

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[14] Similar statutes governing conduct by other agencies include, *e.g.*, 15 U.S.C. § 717f (certificates of public interest to natural-gas companies by Federal Energy Regulatory Commission); 30 U.S.C. § 226(j) (approval by Secretary of Interior of cooperating operating plans by oil and gas lessees); 49 U.S.C. § 1372 (permits for foreign air transportation); 49 U.S.C. § 11343 (Interstate Commerce Commission approval of rail mergers).

The FCC adopted by rulemaking certain rules, procedures and policies which it determined to employ in its cellular licensing task. It considered using lotteries to select among qualified applicants, but it chose instead to use its traditional "comparative hearing" format, believing that "there *may* be significant differences among competing applications." *Cellular Systems, supra,* 86 F.C.C.2d at 499 (emphasis added). In furtherance of that approach the FCC established special criteria for gauging the relative worth of applicants (*id.* at 502-03), but the general nature of these criteria necessarily left determination of the "public interest" to each individual comparative licensing contest.

Celcom did not have, and still does not have, a quarrel with the rules, procedures and policies originally stated in 1981. Thus, when the FCC's rulemaking orders, *Cellular Systems, supra,* were subject to direct attack by petitions for review pursuant to 47 U.S.C. § 402(a), Celcom was not a party aggrieved within the meaning of 28 U.S.C. § 2344. Celcom did not become aggrieved until the original rules, procedures and policies had been substantially eroded and then were applied in the subsequent Philadelphia licensing proceeding in such a way that Celcom's application was denied and its right to appeal the licensing decision ripened under 47 U.S.C. § 402(b).

The problem with the application of the rules, policies and procedures in Philadelphia arose only when it became clear that they were being applied in a manner that degenerated the cellular selection process into a comparison of trivia and ephemera having no mooring to the statutory public interest standard.[15] The Commis-

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[15] In practice, most of the paper proposals of competing applicants were essentially ignored by the FCC. As Commissioner Dawson stated in partial concurrence with the FCC's lottery decision:

sion was making clear that, while it was purporting to award licenses on the basis of the application proposals, it did not expect the application proposals to be implemented. Rather, cellular licensees were expected to build their systems on the basis of actual facts encountered in the marketplace after the hearing selection process was completed, rather than on the basis of the application proposals used to win the licenses. Decisions by cellular licensees concerning virtually all aspects of their systems—from design to rates—were essentially deregulated. Celcom App. Br., pp. 20-29. The application of the public interest standard became only a fantasy. After the Court of Appeals' decision in this Philadelphia case, the Chairman of the FCC summed up the experience:

> We've seen our comparative analyses come down to things that quite frankly are inconsequential and *cannot by any reasonable stretch of the imagination be truly considered to be material or relevant to a reasoned decision* as between two or more applicants.

Remarks of FCC Chairman Fowler, Open Meeting on Spectrum Allocation, Gen. Docket Nos. 84-1231, 1233,

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I am convinced that the comparative procedure originally adopted by the Commission has not, for the most part, produced a meaningful comparison of relevant criteria but has devolved, like so many of our broadcast comparative cases, into a trivial comparison of minute factual distinctions. This belief is underscored by our recent decisions in the *Chicago* and *Pittsburgh* cellular proceedings, where our decisions were based on factual distinctions of arguable significance in the operation of a cellular system. My strong preference would have been to refine our cellular comparative procedures [in markets beyond the top 30] and to use tie-breaker lotteries in cases where there are no significant differences (i.e., where factual distinctions cannot be said to affect service to the public). (Statement of Commissioner Mimi Weyforth Dawson Concurring in Part and Dissenting in Part, 98 F.C.C.2d at 229 (footnotes omitted)).

1234, July 24, 1986, 10:26 a.m. (available from The PRISM Corporation) (emphasis added).

Celcom appealed the FCC's Philadelphia decision on the ground that the selection of AWACS was devoid of any meaningful nexus with the statutory public interest standard of 47 U.S.C. § 309(a), "the touchstone for the exercise of the Commission's authority." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Celcom urged that preferences awarded to AWACS (based on its market research) were not rational predictions that AWACS would in fact provide superior service to the public and that the FCC's comparative evaluation in this case thus was meaningless under the law.[16] AWACS' preferences rested on features of its application that the FCC had already made clear it no longer expected to be implemented in practice, and over which the FCC had effectively renounced meaningful regulatory oversight. These application features had no relation to actual service to the public and had no value for predicting which applicant would provide better service. Celcom Exceptions, pp. 12-14, 19-21, 30-31; Celcom App. Br., pp. 20-36.

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[16] AWACS' market research studies, which were the source of its preferences, had been conducted in early 1982 and were essentially out of date by the time it began operation. *See* Celcom Commun. Corp., 100 F.C.C.2d 638, 644 (1984) (actual system will likely be "substantially modified when it is built" based "on an updated assessment of the needs of the market"), *aff'd in part, New York, supra.* Moreover, reliance on market studies as the primary basis of decision was at odds with the FCC's original criteria. The FCC stated in its 1981 rulemaking that the "results" of market studies would be a factor to be considered "[i]n comparing proposed service areas," 86 F.C.C.2d at 502, but AWACS received no credit for its system coverage. (A. 14a-15a.) The rulemaking also stated that "the public need indicated by subscriber surveys" could be considered under the third comparative criterion (service offerings), *id.* at 503, but AWACS was the only applicant *not* awarded a preference under this issue. (A. 29a-33a.) Celcom argued this inconsistency to the D.C. Circuit, but the court rejected the argument without discussion. Celcom App. Br., pp. 41-43; A. 3a.

"The 'public interest' to be served under the Communications Act is . . . the interest of the . . . public in 'the larger and more effective use of radio.'" *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216 (1943). Celcom contended that the FCC's Philadelphia comparison provided *no* basis to determine which applicant would foster the "larger and more effective use" of cellular telephone service.[17]

The D.C. Circuit did not disagree with the substance of Celcom's argument. Nor is it Celcom's purpose to ask this Court to agree or disagree with the substance of Celcom's argument. Instead, Celcom seeks this Court's review of the D.C. Circuit's refusal even to consider the matter, on the apparent ground that Celcom's argument was in reality only an untimely challenge to the FCC's 1981 rulemaking opinion. Because Celcom did not seek review of the rulemaking, the court held, Celcom could not complain that the resulting comparative evaluation lacked a nexus with the public interest standard.[18]

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[17] The FCC stated in its lottery decision that selection of cellular applicants by lot would not result in an "identifiable reduction in the quality of service" as compared with selection through the comparative hearing process. 98 F.C.C.2d at 179. While the D.C. Circuit disagreed in *Atlanta* that the FCC's statements in its lottery decision were "the confessions of a penitent regulatory agency which has belatedly recognized the public-interest bankruptcy of the comparative process," (A. 55a-56a), and concluded that the decision to employ lotteries in future cases was motivated chiefly by practical concerns with the "administrative burden" of hearings (A. 56a), the court did not deny that the FCC was highly critical of the comparative process in the lottery decision. Nor did the court rule that the comparative process had enabled the FCC actually to identify the applicant that would best serve the public interest as required by 47 U.S.C. § 309(a).

[18] Although the D.C. Circuit in *Atlanta* enumerated other "occasions" on which Celcom's affiliate could have challenged the lack of public-interest content in the comparative process (A. 55a), quoted *supra* n.10, these opportunities did not present real or practical opportunities to correct the agency's ultimate error of basing its

If such a refusal by the Court of Appeals is allowed to stand, it will effectively insulate agency licensing decisions from review as to the most basic licensing question—whether the actual selection of one applicant over another was in the "public interest." The approach by the Court of Appeals also has adverse ramifications for an even larger number of agency proceedings. Thus, the improper implementation of any rule in an individual case could be sheltered from judicial scrutiny on the ground that any court challenge after the rulemaking is untimely.

It was impossible for Celcom to have foreseen at the time of the rulemaking order that application of the order's general guidelines four years later in this licensing case would be devoid of any public interest significance.[19] It only became obvious during the comparative

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selection on meaningless factors. The failure to comment or seek agency reconsideration during the original rulemaking is *a fortiori* not a basis to block judicial review at the post-hearing stage if the failure to seek judicial review of the rulemaking is not such a basis. The failure to appeal from the hearing designation order should similarly not be a bar to post-hearing review if, as here, the designation order was consistent with the rulemaking. *See also,* 47 C.F.R. § 1.115(e)(3) (requiring deferral of applications for review of hearing designation orders until filing of exceptions); 47 C.F.R. § 1.106(a)(1) (permitting petition for reconsideration of hearing designation order only insofar as designation order "relates to an adverse ruling with respect to petitioner's participation in the proceeding"). Finally, there was no need to seek to "expand the issues" because the issues as designated required a composite determination of where the public interest lay. As to all of these "occasions," of course, it would have been premature to challenge the agency's grounds for selecting AWACS because the selection was not made, and the grounds therefor stated, until the end of the comparative proceeding.

[19] It is even open to question whether Celcom or any other party could have sought review of that portion of the FCC's 1981 rulemaking opinion that described the bases for comparison. Such a general agency statement, without application to specific parties or facts, would appear to have been unreviewable under the ripeness doc-

adjudication process that the criteria generally described in the rulemaking were being developed, defined and applied in an utterly meaningless way.[20] This Court has recognized "the rapidly fluctuating factors" that affect the Commission's public-interest determinations, and "the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *Pottsville Broadcasting, supra*, 309 U.S. at 138. To require parties to seek review of such preliminary and general Commission statements about comparative criteria before they are applied is contrary to the whole idea of such flexibility.

The holding by the Court of Appeals that failure to seek review of the 1981 rulemaking barred Celcom's challenge to the application of the rules to this specific Philadelphia case also fundamentally misconceives the nature of the FCC's duty. The Communications Act requires the FCC to make a public interest determination in every case in which it grants a license. Justice Frankfurter succinctly described the principles involved:

> With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. . . . Under § 309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine *in each case* whether a grant would serve public interest, con-

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trine, whose "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision ha been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). *But cf.* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (reviewing FCC Policy Statement and not discussing ripeness questions).

[20] *See* n.16 *supra.*

> venience, or necessity. . . . Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. *No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest.*

Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407, 431-432 (1942) (dissenting on other grounds) (emphasis added). Writing for the Court in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943), Justice Frankfurter said:

> In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience or necessity." If time and changing circumstances reveal the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.[21]

It follows from these principles that the Court of Appeals cannot avoid review of public-interest determinations in the granting of individual licenses because an earlier adopted general policy or rule went unreviewed.[22] As recognized in *Functional Music, Inc.* v.

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[21] *See also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981) ("Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.")

[22] The very structure of the Communications Act confirms this obligation. While rulemaking orders are generally reviewable in any Circuit under Section 402(a) of the Act, individual licensing orders are separately reviewable exclusively by the D.C. Circuit under Section 402(b). 47 U.S.C. § 402(a), (b).

FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), "the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating the rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action appiying it." 274 F.2d at 546, *citing Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 421 (1942). *See also Geller* v. *FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979). The reason for the rule in *Functional Music* is simple: "limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." 274 F.2d at 546.[23]

The Court of Appeals' refusal even to consider that the FCC's cellular comparative hearing rules, procedures and policies had become bankrupt by the manner of their application to the Philadelphia applicants appears to coincide with a trend in the D.C. Circuit toward dramatic curtailment of the ability of parties to seek review of regulations at the time of their application in individual circumstances. *See Eagle-Picher Industries* v. *EPA*, 759

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[23] Even if it be conceded that immediate judicial review of the FCC's 1981 cellular rules, procedures and policies, *Cellular Systems, supra,* would have affirmed the FCC's action, such review would not and could not have established that the FCC in any subsequent licensing proceeding conducted under the broad banner of the rulemaking's statements would *in fact* apply those statements in a manner that was reasonably calculated to select the applicant which would best serve the public interest. Review *vel non* of the rulemaking is thus irrelevant to Celcom's argument that the FCC's application of the general criteria to this specific case had not rested on meaningful public-interest differences among cellular applicants. This Court has established that, regardless of the terms of a prior general rulemaking statement, the FCC must make a public interest determination in every case. The D.C. Circuit has improperly foreclosed review of that elemental statutory requirement.

F.2d 905, 909 (D.C. Cir. 1985).[24] This underscores the need for this Court's review here.

The D.C. Circuit's preclusionary approach to judicial review calls for this Court to exercise its power of oversight to prevent denial of substantive review of licensing decisions simply because general, pre-decision rules, statements of policy, criteria or guidelines had not been directly challenged in court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 21, 1986

[24] The rule in *Eagle-Picher* seems to *presume* that direct review of a regulation would be permissible under the ripeness doctrine at the time of adoption, thereby making attempts to review regulations at the time of their later application presumptively untimely:

> As a general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred . . . . [E]xcept where events occur or information becomes available after the statutory period expires that essentially create a challenge that did not previously exist, or where a petitioner's claim is, under our precedents, *indisputably* not ripe until the agency takes further action, we will be very reluctant, in order to save a late petitioner from the strictures of a timeliness requirement, to engage in a retrospective determintion of whether we would have held the claim ripe had it been brought on time.

759 F.2d at 914 (emphasis in original).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1070

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

CELCOM COMMUNICATIONS CORPORATION
OF PENNSYLVANIA,
AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.,
Intervenors

No. 85-1079

CELCOM COMMUNICATIONS CORPORATION
OF PENNSYLVANIA,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA,
AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.,
Intervenors

No. 85-1594

CELCOM COMMUNICATIONS CORPORATION
OF PENNSYLVANIA,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

Appeal from an Order of the
Federal Communications Commission

Argued May 12, 1986

Decided June 10, 1986

Edward P. Taptich, with whom *Charles C. Hunter* and *Laura C. Mow* were on the brief for Cellular Mobile Systems of Pennsylvania in Nos. 85-1070 and 85-1079.

Edgar F. Czarra, Jr. for appellants, Celcom Communications Corporation of Pennsylvania. *Jonathan D. Blake, S. William Livingston, Jr.*, and *Alan A. Pemberton* were on the brief for Celcom Communications Corporation of Pennsylvania in Nos. 85-1070, 85-1079 and 85-1594.

Roberta L. Cook, Counsel, Federal Communications Commission, with whom *Jack D. Smith*, General Counsel and *David M. Armstrong*, Associate General Counsel, Federal Communications Commission were on the brief for appellee in 85-1070, 85-1079 and 85-1594.

Lawrence M. Miller for intervenor Automatic Wide-Area Cellular Systems, Inc. in 85-1070 and 85-1079.

Michael L. Volkov, Stephen A. Weiswasser and *Thomas J. Dougherty* also entered appearances for intervenor, Automatic Wide-Area Cellular Systems, Inc. in 85-1070 and 85-1079.

Before: MIKVA, EDWARDS and SCALIA, *Circuit Judges.*

Opinion for the Court PER CURIAM.

PER CURIAM: Appellants Cellular Mobile Systems of Pennsylvania ("CMS") and Celcom Communications Corporation of Pennsylvania ("Celcom") are unsuccessful applicants for the Philadelphia nonwireline cellular telephone license. They challenge the decision of the Federal Communications Commission ("FCC") to award the

license to Automatic Wide-Area Cellular Systems, Inc. ("AWACS"). We affirm the Commission's decision. Most of the arguments made by Celcom and CMS focus on issues that have already been resolved in previous cellular telephone appeals[1] or otherwise are without merit. Two contentions, however, warrant brief comment.

I.

Celcom and CMS argue that, in evaluating the competing applications, the FCC erred in awarding AWACS a moderate preference for its superior assessment of relative demand. In particular, they claim that the AWACS market study merited no preference because it ignored the nonbusiness component of demand. We disagree. The FCC reasonably concluded that AWACS should receive a preference even though its demand estimates were based only on business users. None of the applicants' studies included nonbusiness users; and, in all other respects, the AWACS market study was, without doubt, superior to the studies of the other applicants. Moreover, AWACS did not merely assume that business users would be the only significant cellular telephone customers. Instead, AWACS conducted a residential survey, and, based on the results of this survey, the advice of its consultants, and its own business judgment, AWACS reasonably concluded that nonbusiness use would be insignificant.[2] Similar preferences have been given to market

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[1] *See Celcom Communications Corp. v. FCC*, Nos. 84-1587 & 85-1316, slip op. (D.C. Cir. Apr. 29, 1986) (*"New York"*); *Celcom Communications Corp. of Georgia v. FCC*, 787 F.2d 609 (D.C. Cir. 1986) (*"Atlanta"*); *Cellular Mobile Sys. of Illinois, Inc. v. FCC*, 782 F.2d 214 (D.C. Cir. 1986) (*"Chicago"*); *Cellular Mobile Sys. of Pennsylvania, Inc. v. FCC*, 782 F.2d 182 (D.C. Cir. 1985) (*"Pittsburgh"*).

[2] AWACS explained that businesses historically have been the primary users of mobile telephone service and that much of the residential demand shown by the market study reflected "demand overlap," *i.e.*, the extent to which business users employ their mo-

studies that excluded residential demand in the Chicago and Atlanta markets.[3]

Notwithstanding the claims made by Celcom and CMS, the FCC Final Decisions in the San Diego [4] and Phoenix [5] proceedings do not require a different result in this case. The cited unsuccessful applicant in Phoenix conducted no residential study, and based its assumption that residential demand would be insignificant solely on its "experience." Additionally, the Phoenix study had other serious defects—such as its assumption that paging service provides a good model for cellular telephone demand. The San Diego proceeding involved the *same* survey methodology at issue in Phoenix. Because the *same* applicant using the *same* study methodology was involved in both the Phoenix and San Diego proceedings, the FCC correctly concluded that the decision in Phoenix "compel[ed] a finding that [the applicant's] demand assessment [in San Diego] is defective." [6] We do not read the *San*

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bile telephones for residential use, and vice versa. Joint Appendix ("J.A.") 267. Moreover, although the study suggested high residential demand, AWACS reasonably concluded that the actual residential demand would be small because "a body of literature" established that residential demand studies are not reliable. J.A. 267-68. Finally, cellular telephone service initially will be relatively expensive so that business applications "will be the first and primary uses" during the 1983-1993 time frame of the AWACS study. J.A. 246.

[3] *See Atlanta*, 787 F.2d at 614 n.10; *Chicago*, 782 F.2d at 217-18.

[4] *Gencom, Inc.* (*"San Diego Final Decision"*), FCC 85-109 (March 15, 1985), *aff'd sub nom. Metro Mobile CTS, Inc. v. FCC*, No. 85-1235 (D.C. Cir. May 15, 1986) (order).

[5] *Gencom, Inc.* (*"Phoenix Final Decision"*), 56 RAD. REG. 2d (P & F) 1597 (1984), *reconsideration pending*, FCC 83-50 (Nov. 5, 1984), *appeal docketed sub nom. Cellular Mobile Sys. of Arizona, Inc. v. FCC*, Nos. 84-1542 & 84-1552 (D.C. Cir. Nov. 2, 1984).

[6] *San Diego Final Decision*, FCC 85-109, slip op. at 12 (March 15, 1985).

Diego Final Decision, however, as embracing an FCC policy requiring the denial of a preference to any market study that ignores residential demand. Indeed, in the *San Diego Final Decision*, the FCC left open the possibility that an applicant who adequately explained an assumption that businesses would be the primary users could merit a preference.[7]

Therefore, as we understand current FCC policy, a business-only market analysis may warrant a preference when the applicant provides evidence—such as additional market studies of residential demand coupled with the exercise of business judgment and experience—that there is a sound basis for excluding consumer demand. This is particularly so when, as here, the applicant's study is otherwise qualitatively better than competing studies because it forecasts demand on the basis of more reliable data. We conclude that the FCC decision in this case was consistent with current policy.

II.

Celcom argues that the FCC erred in refusing to reopen the record to examine the possible anticompetitive impact of the AWACS cellular telephone proposal on the Philadelphia paging market. Although this court remanded a similar issue in the *New York* appeal,[8] we conclude that no such action is required here. In *New*

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[7] The FCC explained:

> Moreover, in marked contrast to Gencom's unsubstantiated assumption that business would be the primary user of cellular service, the winning applicant in the Chicago proceeding substantiated its assumption with a two-fold showing: a study showing that business is the primary user of conventional two-way radio as well as a showing that cellular service would be relatively expensive.

Id.

[8] *New York*, Nos. 84-1587 & 85-1316, slip op. at 6-8 (D.C. Cir. Apr. 29, 1986).

York, Celcom raised this issue in its exceptions to the Administrative Law Judge's decision. In marked contrast, however, in the instant proceeding Celcom raised this issue *after* the FCC had issued its Final Decision. Because Celcom easily could have raised this issue at an earlier stage in the proceeding, we affirm the Commission's conclusion that Celcom's request to reopen the record was untimely.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 85-1070, 85-1079 & 85-1594

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA, *et al.*
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

[Filed June 30, 1986]

Before: MIKVA, EDWARDS and SCALIA, *Circuit Judge.*

ORDER

It is ORDERED, by this Court, *sua sponte*, that the opinion for the Court filed Per Curiam on June 10, 1986 be, and hereby is, amended as follows:

Page 6, line 10, change

"this issue *after* the FCC had issued its Final Decision."

to read instead

"this issue *after* Exceptions and Reply Exceptions to the Administrative Law Judge's decision had been filed."

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 84-649
35421

CC Docket No. 83-25

IN RE APPLICATIONS OF

File No. 26164-CL-P-(16)-82

CELCOM COMMUNICATIONS CORPORATION
OF PENNSYLVANIA

File No. 26084-CL-P-(18)-82

AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

File No. 26188-CL-P-(16)-82

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA

File No. 26113-CL-P-(13)-82

MCI CELLULAR TELEPHONE COMPANY

For a construction permit to establish a new cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Philadelphia, Pennsylvania Standard Metropolitan Statistical Area

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Appearances

Curtis T. White, Mary E. Brooner and *Edward Hayes, Jr.*, on behalf of Unity Telecommunications Systems, Inc.;

S. William Livingston, Jr., Alan A. Pemberton, Thomas William Mayo and *Jonathan D. Blake* on behalf of Celcom Communications Corporation of Pennsylvania; *Lawrence M. Miller* and *Michael T. Volkov* on behalf of Automatic Wide-Area Cellular Systems, Inc.; *Edward P. Taptich, Charles C. Hunter, Laura Mow, Lawrence Movshin* and *Jean Kiddoo* on behalf of Cellular Mobile Systems of Pennsylvania; *John M. Pelkey, Melodie A. Virtue, William J. Potts, Jr.*, and *Gary M. Fereno* on behalf of MCI Cellular Telephone Company; and *James O. Juntilla, Robert W. Spangler, Jerry M. Hermele*, and *Frederick F. Fitzgerald* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

Final Decision

Adopted December 31, 1984 Released January 8, 1985

By the Commission: Commissioners Dawson and Patrick concurring in the result.

Background

1. In this proceeding, the captioned applicants have filed exceptions to the Initial Decision of Administrative Law Judge Joseph Chachkin granting the application of Automatic Wide-Area Cellular Systems, Inc. (AWACS) in the Philadelphia nonwireline cellular proceeding. *Celcom Communications Corporation of Pennsylvania*, FCC 83D-25, released September 16, 1983. Judge Chachkin found AWACS' application to be comparatively superior to those of the other mutually exclusive applicants under two of the three issues designated for hearing and concluded that grant of AWACS' application would better serve the public interest, convenience and necessity. Celcom Communications Corporation of Pennsylvania (Celcom), Cellular Mobile Systems of Pennsylvania (CMS) and MCI Cellular Telephone Company (MCI) have filed exceptions to the Initial Decision (I.D.). For the reasons

stated below, we affirm the *I.D.* with modifications, and we affirm the grant of AWACS' application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference.

2. On January 27, 1983, the Chief, Common Carrier Bureau designated the captioned applications (and that of Unity Telecommunications Systems, Inc.) for hearing on the following issues: [1]

(a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

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[1] Advanced Mobile Phone Service, Inc. (Philadelphia Designation Order), 52 RR 2d 1593 (Com. Car. Bur. 1983). In this order, financial qualifications and site availability issues were designated against Unity. As a result of a merger between CMS and Unity, the Unity application was dismissed and original issues (a) and (b) involving Unity's application only rendered moot. For the purposes of clarity and consistency with our other cellular decisions, we have redesignated the remaining issues (a) through (d).

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

The Separated Trial Staff of the Common Carrier Bureau (STS) was also made a party to the proceeding.

3. Pursuant to the special expedited procedures for cellular applications in the top 30 markets,[2] the applicants filed their written direct cases with their applications on June 7, 1982. Rebuttal testimony was filed on March 16, 1983. The first hearing was held on April 27, 1983 at which time the Judge ruled on the admissibility of direct and rebuttal exhibits and directed that surrebuttal and other additional materials be filed on May 4. A second hearing session was held on May 12 for the cross-examination of Celcom witness Paul L. Coppage; on May 13 a final hearing was held to dispose of further evidentiary matters and the record was closed. Proposed Findings of Fact and Conclusions of Law were filed on June 13, 1983; Reply Findings were filed ten days later.

4. In the *I.D.*, the judge awarded CMS a slight preference under Issue (a) for its proposed geographic area and population coverage.[3] He awarded AWACS a substantial comparative preference for its assessment of relative demand and a moderate preference for its ability to accommodate demand for local service. CMS and MCI each received a slight preference for ability to accommodate roamers. Based on the individual preferences, AWACS received a moderate preference under Issue (a)

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[2] Cellular Communications Systems (Cellular Reconsideration Order), 89 FCC 2d 58, 87-91 (1982). *See also* 47 C.F.R. § 22.916 (b) (1).

[3] We use the terms "slight," "moderate" and "substantial" to describe the preferences awarded to the applicants. A "moderate preference" is identical to a "preference," and receives the same comparative credit.

as a whole. AWACS also received a moderate preference under Issue (b) for its system expansion proposal. Under Issue (c), MCI was awarded a slight preference for its proposed service offerings, CMS a slight preference for its proposed rate structure, and AWACS a slight preference for its maintenance plans. The judge found that the preferences awarded AWACS outweighed the other preferences, and accordingly, found AWACS' proposal superior to those of the other applicants.

5. On November 14, 1983, Celcom, CMS and MCI filed their exceptions to the *I.D.* All four applicants and the STS filed reply exceptions on December 6, 1983.[4]

Issue (a)

6. Issue (a) calls for a comparison of the geographic area and population the applicants propose to serve, the relative demand for service and the applicants' ability to accommodate demand for both local and roamer service.[5] *See Rogers Radiocall, Inc. (Chicago Final Decision)*, 55 RR 2d 1261 (1984), at para. 8, *recon. denied, Chicago Reconsideration Order*, 56 RR 2d 951 (1984), *appeal pending, Cellular Mobile Systems of Illinois, Inc. v. FCC*, No. 84-1456 (D.C. Cir. filed September 4, 1984); *MCI Cellular Telephone Company (Pittsburgh Final Decision)*, 55 RR 2d 1215 (1984) at para. 9, *recon. denied,*

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[4] In addition, the parties have filed numerous additional motions since that time on a variety of procedural and substantive matters including an Application for Review of the Bureau's denial of a proposed partial settlement between CMS and MCI. These matters are discussed in paras. 42-50, *infra.*

[5] In Cellular Communications Systems, 86 FCC 2d 469, 502 (1981), we stated that the geographic area that an applicant proposed to serve would be a major basis of comparison. We also noted that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics as well as indications of a substantial public need, including the results of public need surveys" would be significant factors to consider.

Pittsburgh Reconsideration Order, 56 RR 2d 936 (1984), *appeal pending, Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, No. 84-1131 (D.C. Cir. April 5, 1984).

7. *Geographic Area and Population.* The judge found that the Philadelphia MSA encompasses 3,532 square miles in Bucks, Chester, Delaware, Montgomery and Philadelphia counties, Pennsylvania; and Burlington, Camden and Gloucester counties, New Jersey. The MSA's 1980 census population is 4,716,818. The following table presents the judge's finding as to the area and population proposed to be served by each applicant.

	Geographic Area Served [6]		Population	
	Total	Percentage of MSA	Total	Percentage of MSA
AWACS	2,930	82.9%	4,532,000	96.1%
Celcom	2,813	79.6%	4,522,583	95.9%
CMS	2,741	77.6%	4,580,625	97.1%
MCI	2,708	76.7%	4,493,973	95.0%

I.D., para. 7.

8. The judge found that all four applicants propose service to the bulk of the Philadelphia MSA, including most major population, employment and traffic corridors and at least 95% of the area's population. *I.D.*, para. 71. He found, however, that CMS deserved a slight preference for its area and population coverage because even though AWACS would serve 189 more square miles than CMS, CMS would serve 48,000 more persons. Moreover, the judge found CMS' proposed highway coverage superior to AWACS' and MCI's (and equal to that proposed by Celcom) and that its areas of exclusive coverage

[6] For purposes of comparison, the geographic area served is that area within the applicant's composite 39 dBu contours within the MSA. The percentages given are of the total area and population of the Philadelphia MSA.

contain 81,000 more persons, 954 more businesses, 5,416 more employers, 3129 additional households with income over $50,000 and would generate 32 more users than the "pockets" of coverage served by AWACS and not by CMS. *I.D.*, para. 9.[7]

9. Celcom, CMS and MCI except to the judge's findings on this sub-issue.[8] Celcom asserts that CMS should not be the preferred applicant because intra-system interference would reduce the effective coverage of CMS' proposed system below that of the other applicants and that it would offer the best coverage relative to AWACS and MCI.[9] MCI objects to the overall methodology adopted by the judge for evaluating relative highway coverage [10] and asserts that he erred by incorrectly evalu-

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[7] The judge found AWACS' pocket coverage superior to that proposed by MCI or Celcom.

[8] AWACS did not except to the judge's award of a slight preference to CMS for its coverage proposal.

[9] For the most part, Celcom's exceptions concentrate on whether it should be preferred over AWACS on this issue and not whether CMS was properly awarded a slight preference. Similarly, MCI's exceptions concentrate on whether its coverage proposal should be preferred over those of AWACS and Celcom. Since we are awarding CMS a slight preference, it is not necessary to rank the remaining proposals for less than a slight preference or address arguments directed at the other applications.

[10] The judge multiplied the annual average daily traffic (AADT) for each highway segment that an applicant failed to cover by the number of miles of that highway outside the applicant's 39 dBu contours to determine its missed traffic volume. MCI argues that this ignores "temporal" factors such as speed limits, as well as actual speeds at different times of day, and thus does not accurately reflect whether a coverage gap would really result in no service or merely a short interruption or delay in completing a call. We have reviewed the applicants' relative highway coverages and find that, in most cases, they differ by only a few miles on fringe highway segments. *I.D.*, note 17. Since, as MCI suggests, these differences may not represent significant differences in actual reliable service, we have accorded the judge's highway analysis limited comparative weight.

ating its proposed highway coverage.[11] In addition, CMS seeks a substantial, rather than a slight, preference for its area and population coverage asserting that it proposed a more efficient and better tailored system and because AWACS' greater geographic coverage results from unnecessary coverage of the southeastern section of the MSA consisting primarily of permanent open space and very sparse population.

10. We find no basis in these exceptions for overturning the judge's award of a slight preference to CMS for area and population coverage. CMS has proposed coverage of more of the total population of the MSA than the other applicants and, along with Celcom, proposed the best coverage of major highways. Moreover, its areas of exclusive coverage, reflect higher indicia of cellular demand that the exclusive areas of the other applicants. In addition, we reject Celcom's argument that the coverage of CMS' system will be reduced as a result of intra-system interference. CMS admits the existence of intra-system interference between certain cells in its first year system, but asserts that its overlapping cell structure is designed to prevent any loss of coverage because an interference-free channel will be available from one of a number of overlapping cells. CMS Surrebuttal Exhibit, pp. 3-7, 21-22; CMS Reply to Exceptions, pp. 4-5. Celcom's argument is merely speculative and it has not rebutted CMS' explanation.[12]

11. We decline to expand CMS' slight preference absent some showing that the judge's decision is unreasonable. The judge awarded a slight, rather than a mod-

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[11] MCI asserts that the judge incorrectly used a map that did not use the standard 100 foot minimum elevation for determining 39 dBu coverage, and thus compared the highway coverage of MCI and the other three applicants on an unequal basis. However, even if we accept MCI's revised highway coverages, it would not change our conclusions on this sub-issue given the greater area and population coverage of CMS as well as its superior "pocket coverage."

[12] Considerations involving intra-system interference are discussed further in n.22 and para. 29, *infra*.

erate preference, because all applicants propose to serve the bulk of the Philadelphia market. CMS has not demonstrated that this conclusion was in error. *See American Mobile Communications of Washington and Oregon* (Portland Final Decision), FCC 84-371, released August 24, 1984, at para. 15.

12. We also decline to give CMS credit for its depth of coverage design. This matter has been dealt with in the *Chicago Final Decision* where we declined to give CMS credit on this issue because CMS failed to demonstrate that service to portables would be impaired in the absence of overlapping cells.[13] CMS has also failed to meet this burden here.[14]

Relative Demand for Service

13. All of the applicants for the Philadelphia non-wireline license conducted demand studies in an effort to determine the level of demand, how demand is distributed around the MSA, and how demand will change over time. All four applicants forecast the levels of demand they expect to serve as set forth below:

Year of Operation	Celcom	AWACS	CMS	MCI
1	1,300	8,681	4,254	3,000
2	4,100	10,471	9,919	6,300
3	7,690	13,869	16,999	10,000
4	11,900	18,563	22,655	14,600
5	None	22,999 [15]	28,302	19,700

I.D. para. 12.

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[13] Chicago Final Decision, *supra*, at para. 14; Pittsburgh Final Decision, *supra*, at para. 42. Accordingly, we do not affirm the judge's conclusions on this matter to the extent inconsistent with our Chicago and Pittsburgh holdings.

[14] Even assuming, *arguendo*, that overlapping design is necessary, the other Philadelphia applications also have a high degree of overlap. *See* I.D., para. 10.

[15] AWACS also provided a forecast of demand for years 6-11 of operation.

14. The judge found that AWACS should receive a substantial preference for its determination of relative demand for cellular service in the Philadelphia MSA. He found AWACS' market analysis more reliable than those of the other applicants and that AWACS used this information in designing a demand-based cellular system. AWACS conducted three surveys of the Philadelphia MSA encompassing both business and residential users soliciting responses regarding various rate levels at which respondents would purchase service, types of service desired and areas of high interest in cellular service. *I.D.*, para. 73. In addition, it developed demographic data unique to the Philadelphia market and was the only applicant to identify probable demand on a census tract basis. *Id.* AWACS described in detail the methodology and assumptions by which it forecast yearly demand and, the judge found its assumptions to be reasonable. In contrast, the judge found Celcom's public need showing patently defective and its overall market study so inadequate as not to warrant comparative consideration. *I.D.*, para. 74. As to CMS, the judge criticized its failure to establish a nexus between the results of its market studies and its projection of demand and distribution of demand within the MSA. He also found that its research rested on certain dubious assumptions which prejudiced its determination of the nature of the Philadelphia cellular market; e.g., that paging is a precursor of cellular radio, and that there is a consistency of demand for cellular radio among markets.[16] *I.D.*, para. 75. Finally, the judge criticized MCI's demand showing for failing to ascertain whether respondents were authorized to indicate their firm's willingness to purchase cellular service

[16] The latter proposition was explicitly stated in the Claritas study in which no Philadelphia MSA businesses were surveyed and implicitly in the Westat Report where data for all top-30 MSAs were combined. Thus, the judge concluded that there was serious doubt as to whether CMS' demand projections are based on an in-depth analysis of the Philadelphia market.

and for failing to distribute demand within the MSA. *I.D.*, para. 76.

15. Celcom, CMS and MCI each except to the judge's "point-by-point" criticisms of their respective forecasting techniques. Celcom submits that accurate forecasts are impossible and irrelevant for comparative purposes. CMS argues that it should be preferred because its estimate of demand is higher than AWACS' and because it demonstrated a nexus between its market research and forecasts. CMS and MCI argue that AWACS' foreca ts are seriously flawed, pointing to several unsubstantiated assumptions and unexplained inconsistencies in AWACS' relative demand study.[17] Finally, CMS contends that MCI did not establish a nexus between its market research and the subscriber forecast.

16. After carefully reviewing the record in this proceeding, as well as the decisions in our previous comparative cellular proceedings, we conclude that the Judge's conclusions with respect to relative demand should be modified. We will award AWACS a moderate preference, rather than a substantial one, and MCI will receive a slight preference, rather than no preference. Overall, AWACS employed the most reasonable assumptions and could best be relied upon for designing a cellular system responsive to the particular needs of the Phidalephia market. Among the four applicants, AWACS performed the most reliable and market specific assessment of demand. Its survey was more detailed and comprehensive. Most important, its distribution model used census tract data to identify the areas where demand would develop.

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[17] For example, MCI argues that AWACS erroneously restricted residential users from its survey universe, failed to disclose the "response rate" to its survey, and excluded many potential users because it based its sample group from the Yellow Pages. CMS argues that the cost disclosed to potential subscribers was inconsistent with AWACS' proposed schedule of charges, and that AWACS' distribution methodology was subjective.

None of the other applicants attempted to ascertain and localize the demand in this manner. *See Chicago Final Decision, supra,* at paras. 22-25. However, we are reducing the substantial preference, which the judge awarded, to a moderate preference because, as the parties point out, its research includes a number of questionable assumptions and its forecasting techniques, while superior to those of the other applicants, are still flawed in some respects. *See* note 17, *supra.* Notwithstanding these criticisms, however, AWACS performed the most market-specific, detailed and well-substantiated assessment of demand in the Philadelphia market. In addition, we find that MCI's surveys are preferable to those of Celcom and CMS because MCI provided more extensive analysis of the market and explained its assumptions in more detail. The judge's major criticism of MCI's study is MCI's failure to detail how it converted its estimate of total realizable demand to its five-year demand protection. While it is true that MCI did not provide extensive details to explain its computations, it did give a general explanation about the factors it used to formulate its projection.[18] *See Portland Final Decision, supra,* at para. 36. Most important, when MCI, Celcom and CMS are compared with each other as a whole, we conclude that MCI's study is the more reliable and deserving of a slight preference. *See Pittsburgh Final Decision, supra,* at paras. 21-22.

17. In contrast, the judge found, and we agree, that Celcom's public need showing is patently defective. Celcom's own market research played no part at its determination of projected demand in Philadelphia and, by the applicant's own admission, was not intended to be statistically valid. *See I.D.,* para. 74. Celcom has not

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[18] However, because AWACS' study is not subject to this criticism and because AWACS provided a more reliable demand distribution, we are awarding AWACS a greater preference than MCI.

rebutted these conclusions.[19] As to CMS, its exceptions to the judge's findings are identical to the exceptions it raised in the *Chicago* and *Pittsburgh* proceedings, as well as in the *Portland* proceeding. We find the resolution of the issues there to be dispositive, and in agreement with the judge's analysis of flaws based on the record developed here. Accordingly, we find no basis to reverse the judge's conclusion that CMS is not entitled to a preference for its demand assessment.

Ability to Accommodate Local Demand

18. The judge awarded AWACS a moderate preference for its ability to accommodate local demand. He found that AWACS designed its system based on its superior public need showing and utilized its market research for determining the initial placement of cell sites, overall system capacity, initial channel requirements and expansion plans. *I.D.*, paras. 30, 77. As a result, AWACS' 39 dBu contours cover most of the area within the MSA defined as having a high potential for cellular usage in AWACS' market studies. The judge concluded that no other applicant conducted as in-depth and detailed an analysis integrally relating technical design to demographics in the design of its cellular system. *I.D.*, para. 77.

19. In contrast, the judge found the ability of Celcom's system to accommodate projected first-year demand essentially unverifiable since the applicant provided no

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[19] There is no merit to Celcom's claim that demand forecasts should not be compared because each applicant will face the same public need. This ignores our basic objective that applicants identify the nature of demand in each market as a basis for designing a cellular system. Celcom's arguments are merely an attempt to redirect the comparative analysis away from a comparison of demand studies. We affirm the judge's conclusion that it failed to provide a sufficient basis for its demand estimates to make them credible.

details as to the capacity and configuration of its system prior to completition of construction in the fourth-year of phased-in operation.[20] Moreover, even fully constructed, the system would have capacity for only 11,700 subscribers, short of its projected demand of 11,900 subscribers. As to CMS, the judge found its system design based on a rigid semi-uniform distribution methodology for localizing demand and assigning channels resulting in an inflexible allocation of demand that fails to incorporate variances in subscriber usage projections.[21] *I.D.*, para. 79. Thus, CMS did not use its market surveys to determine where prospective Philadelphia cellular users would be located and design its system accordingly. The judge also found MCI's ability to accommodate initial local demand inferior to that demonstrated by AWACS because its contours exhibit intercell gaps and other limitations unexplained by its market research. *I.D.*, para. 80. The judge also found that MCI did not indicate how its public need showing related to a specific user distribution for the Philadelphia area or how it assigned channels to individual cells.[22]

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[20] Celcom proposes to begin operation as soon as its central switch and first cell are ready and to phase-in operations over a three-year period at which time its proposed 16-cell system could be complete. Since Celcom's proposed *complete* system will not commence operation until after a 36-month construction period, the judge compared the other applicants' first year systems to Celcom's fourth year of phased-in service.

[21] The judge concludes that this would preclude CMS from achieving its target system-wide grade of service.

[22] The judge also found that AWACS' initial system would experience no co-channel interference and insignificant adjacent-channel interference while each of the other applicants would experience significant intra-system interference problems. Celcom, CMS and MCI except to these findings. We accord no weight to these findings since the possibility of intra-system interference is not a decisional criteria. We have consistently held that some level of interference is expected in a maturing cellular system and that it can be managed effectively since all of the potentially interfering

20. Celcom excepts to the judge's findings on this sub-issue arguing that it would provide equivalent or better coverage than the other applicants with more widely-spaced and therefore less expensive cell sites. It contends that this approach is more likely to be interference-free, facilitate frequency reuse, enable easier relocation of cell sites and more flexibly accommodate changing demand. It also seeks credit for proposing to implement service more quickly than the other applicants. CMS also re-argues under this sub-issue the alleged superiority of its overlapping cell system design as providing greater reliability and capacity than those of the other applicants.

21. We will affirm the judge's decision to award AWACS a preference for ability to accommodate demand. The critical factor in this comparative issue is the demonstration of a nexus between the demand survey/market research conducted by the applicant and its cellular system design. The judge's conclusion that AWACS system design is based on the results of its market research is supported by the record and is reasonable. Its system will have sufficient capacity to accommodate initial forecast demand and includes most of the high potential cellular usage areas within its service contours. *I.D.*, paras. 29-30. Celcom's assertion that it deserves credit for following "fundamental design precepts" and proposing fewer cells is unpersuasive. We have not adopted a single standard for cellular system design;[23] on the con-

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transmitters are under the control of the same carrier. Chicago Final Decision, *supra*, at para. 40; Pittsburgh Final Decision, *supra* at para. 41-43. We emphasize that AWACS' preference is not based on the possibility of interference in the other systems. MCI also faults AWACS' cell configuration for failure to follow an idealized grid. We reject this argument. We have repeatedly indicated that there is no design concept preference for uniform cell placement. See Pittsburgh Final Decision, *supra*, at para. 40; Chicago Final Decision, *supra*, at para. 41.

[23] *See* Cellular Communications Systems, 86 FCC 2d at 507.

trary, we have afforded cellular system designers and operators maximum flexibility in designing their systems. We also see no basis for awarding Celcom a preference for its "phased-in" service plan. Celcom apparently assumes that the other applicants would not institute service at all until the end of the three-year construction period allowable under our rules. 47 C.F.R. § 22.43(c). We see no reason why any carrier would delay commencing service for so long, particularly in light of the entry of the wireline carrier in the Philadelphia market. Nor has CMS demonstrated that its overlapping cell design will better accommodate demand than AWACS' system. CMS is simply repeating its request for comparative credit for its depth of coverage design philosophy and has again not demonstrated that such design is superior. The judge also found that CMS did not rely on forecasts of demand distribution in the Philadelphia MSA in designing its cell sites and channel allocation plan; CMS has not refuted this finding.

Ability to Accommodate Demand for Roamer Service

22. Both CMS and MCI received a slight comparative preference for their proposals to accommodate anticipated roamer demand. The judge found CMS' proposal to enable a foreign subscriber registered in the Philadelphia system to be reached by a single unchanging access number convenient and deserving of some credit. MCI also received a slight preference since it would offer more roaming functions than CMS and, unlike AWACS and Celcom, would provide fully automatic registration.

23. The differences among the applicants' proposals regarding roamer service go to the treatment of roamers by each applicant's system and do not relate to the ability of each system to accommodate roamer traffic. Accordingly, our holding on this sub-issue in the *Chicago Final Decision* (para. 31) controls here and we conclude that there is no basis for awarding a preference to any of

the applicants. Therefore, we will reverse the judge's finding that CMS and MCI are entitled to a slight preference for the ability of their respective systems to accommodate demand for roamer traffic.

24. In summary, under the sub-issues of Issue (a), we have awarded a slight preference to CMS for its geographic area and population coverage, a moderate preference to AWACS and a slight preference to MCI for their assessment of the extent and distribution of relative demand in the Philadelphia MSA, and a moderate preference to AWACS for its ability to accommodate local demand. No applicant received a preference for its ability to accommodate demand for roamer service.

Issue (b)

25. *Expansion plans.* This issue calls for a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet increasing demand. *See Chicago Final Decision, supra,* at para. 33. *In Cellular Communications Systems,* 86 FCC 2d at 503, we indicated preference should be given to designs entailing efficient frequency use, including the applicant's plans with regard to cell splitting and additional channels, the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.

26. The judge concluded that AWACS deserved a moderate preference for its expansion plan.[24] Specifically, the judge concluded that AWACS' expansion plan is based on its superior public need showing and contemplates the use of all available expansion techniques in

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[24] The judge would have awarded a substantial preference but for the fact that AWACS would not correct for significant congestion in its system as quickly as some of the other applicants. *I.D.*, para. 83.

an orderly transition from an initial omni-transmit configurations to a sectorized configuration with new cells added by cell-splitting. *I.D.*, para. 83. The judge found AWACS superior to Celcom because Celcom failed to justify any of its design decisions with overall or cell-by-cell subscriber projections. He also criticized Celcom for its failure to provide a step-by-step expansion plan beyond its fourth year of operation (its first year of completed initial system operation). In addition, Celcom was found to be inferior because its proposed grade of service is lower than that of the other applicants, its system has minimal frequency reuse capabilities, and its cell structure would need substantial modification to accommodate portable units. *I.D.*, para. 84. AWACS was preferred to CMS on this issue because CMS' expansion plan is less flexible in accommodating to unforeseen demand, its system frequency reuse potential is lower, and because its expanding system would suffer undue intra-system interference. *I.D.*, para. 85. MCI did not receive a preference on this issue because it offered no specific proposal for expansion beyond its initial design and did not describe the procedures or standards to be used for identifying when expansion would be required. The judge also found MCI's system would have a lower frequency reuse ratio than AWACS and that it was likely to experience co-channel and adjacent channel interference problems. *I.D.*, para. 86.

27. Celcom, CMS and MCI all except to the preference awarded AWACS, arguing that their own proposals should be preferred. Both Celcom and MCI contend that AWACS should not receive a preference for presenting a ten-year channel plan which, even according to AWACS, will be fine-tuned further as the result of actual experience. Both applicants argue that their expansion plans preserve essential flexibility to meet the unpredictable development of demand for cellular service in the Philadelphia market and that actual operating experience is

the best prediction of actual expansion needs. MCI further argues that AWACS' entire system will require frequency retuning upon commencing cell splitting and both MCI and Celcom except to the judge's findings regarding their frequency reuse potential, grade of service standards and potential for intra-system interference.

28. CMS excepts to the preference awarded AWACS asserting that it provided the most detailed five-year expansion plan and that its system can readily expand during this period through the addition of channels at its existing sites. It criticizes AWACS' expansion plan as generally inferior and for failing to include information necessary to evaluate AWACS' ability to accommodate its forecast demand.[25]

29. We affirm the award of a preference to AWACS for its expansion plan with certain modifications, as set forth below. First, we have decided that the potential for co-channel or adjacent channel intra-system interference of an applicant's system is not of decisional significance, because the system operator has the ability to adjust the operating parameters of its system.[26] Thus,

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[25] CMS also excepts to the judge's exclusion of its profferred rebuttal testimony as irrelevant stating that AWACS' system would suffer serious under-channelization during expansion. The judge accepted AWACS' assertion that the exhibit CMS sought to rebut (AWACS Direct Exhibit 2, Table II, p. 148) was submitted for informational and illustrative purposes only and that AWACS Exhibits IV-A and IV-B of Exhibit 2 describe its channel requirements for its planned expansion. We have reviewed the relevant exhibits and affirm the judge's ruling. AWACS' exhibits provide channel assignments by frequency group for its 10-year expansion plan with adequate capacity to satisfy projected demand while taking into account planned sectorization and cell-splitting. Thus, CMS' rebuttal testimony, based on AWACS' theoretical omni-transmit system described in Table II, is irrelevant. Accordingly, even if we were to reverse the judge and admit the rebuttal testimony, our findings would be unaffected.

[26] Chicago Final Decision, *supra*, at para. 40; See also n. 22, *supra*.

we reject the judge's finding that CMS' system expansion plan will experience undue interference as a result of its failing to follow "the fundamental principle" that spacing between cells should be as uniform as possible. *I.D.*, note 120. In the *Chicago Final Decision*, at para. 41, we decided that a uniformly spaced pattern is not a fundamental design requirement; on the contrary, we have sought to allow cellular applicants the flexibility to design their systems in different ways.[27] CMS' design concept, while different from that of the other applicants, appears viable and consistent with our general requirements for cellular design. Second, we do not prefer one applicant over another merely because of its prospective more extensive reuse of frequencies.[28] Third, we find that all four applicants have proposed a system grade of service acceptable to consumers and have proposed reasonable criteria for determining when increasing demand requires system expansion. Therefore, to the extent the judge discredited Celcom, CMS or MCI on these factors, or preferred AWACS, we reverse such findings.

30. With regard to the remaining exceptions, we disagree with Celcom and MCI that their expansion plans should be preferred for having a greater degree of flexibility. Celcom and MCI say they will expand their systems based on experience, while AWACS would build its large system without knowing where demand will actually develop. We agree with the judge's finding that Celcom's expansion plan does not contain sufficient detail to merit a preference. It has demonstrated no ability to expand its system beyond its initial fully constructed system design. Moreover, Celcom has misconstrued what we mean by flexibility in its assertion that

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[27] 86 FCC 2d at 507; *See also* American Mobile Communications of Washington and Oregon (Seattle Final Decision), FCC 84-368, released August 8, 1984, at para. 43.

[28] Chicago Final Decision, *supra*, at para. 39.

its expansion plan is more flexible in light of its smaller number of widely-spaced cells. This factor does not depend on the comparison of more versus fewer cells, or closely-spaced versus widely-spaced cells, and we therefore reject its contention. *See Celcom Communications Corporation (New York Final Decision)*, at para. 35. Similarly, MCI's criticism of AWACS' expansion plan and advocacy of its own vague plan is equally unavailing. We recognize that MCI understood the alternative methods by which it may undertake expansion; however, it has failed to discuss which of these measures it would employ in Philadelphia and when it would do so. *See Pittsburgh Final Decision, supra*, at para 44; *Portland Final Decision, supra*, at para. 82.

31. As to CMS, its decision to configure its system based on its five-year projections of demand increases the likelihood that substantial modification of its expansion plans will be required if demand does not develop as projected. AWACS' approach of phasing in new cells in years 2-5 is inherently more flexible.[29] We affirm the judge's finding that AWACS' expansion plan is based on its generally superior assessment of demand in the Philadelphia MSA and takes these projections into account on a step-by-step basis. We conclude that AWACS should receive a preference for its well-developed, market-specific expansion plan. At the same time, however, we recognize that the system an applicant ultimately builds will differ from that which it proposed as it modifies its

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[29] Our finding here is not inconsistent with our conclusion in *Portland* where we rejected the judge's finding that CMS' system is less flexible because its cell configuration was based on the fifth year of demand. There, all four applicants had proposed 6-8 cell systems with essentially static cell configurations for the first five years of operation. Here, on the other hand, we are comparing CMS' 23-cell system for the first five years with AWACS' dynamic expansion plan from an initial 18-cell system to 60 cells by the fifth year. Under these circumstances, a finding that AWACS' plan is more flexible is warranted. *See* Chicago Final Decision, *supra* at para. 43.

plans to meet actual demand. This is particularly true with regard to system expansion. *Chicago Final Decision, supra*, at para. 41. Thus, in light of our reversal of certain findings relied on by the judge, we will give AWACS a slight, instead of a moderate, preference on this issue.

Issue (c)

32. Issue (c) requires comparison of the nature and extent of services proposed by each applicant, including rates and charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching facilities). In *Cellular Communications Systems* we indicated that this issue is not as significant as Issues (a) and (b). 86 FCC 2d at 503. We also stated that, while the adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general. Finally, we noted that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal." *Id.*

33. *Service Offerings.* The judge awarded MCI a slight preference for its service offerings. Although all four applicants would offer a variety of such services,[30] the judge awarded MCI a preference because its market research established that a need exists for six service features of which it would offer three. Celcom excepts, asserting that its public need survey also established an interest in the features its proposes to offer, *I.D.*, para. 46, and that MCI should receive a demerit for not offering all six services for which it identified demand. CMS argues that it proposed a variety of services and should be preferred on that basis without regard to demonstrating need.[31]

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[30] A chart depicting each applicant's proposed service enhancement features appears in the *I.D.*, at para. 46.

[31] CMS argues, alternatively, that it should receive a preference for its service offerings, even though it failed to establish a need

34. We affirm the judge's award of a slight preference to MCI and also will grant Celcom a slight preference for its service proposal. In the *Chicago* decision, we held that comparative credit would be awarded for an applicant's service proposal only if it demonstrates a public need for its proposed custom services. *Chicago Final Decision, supra* at para. 46. Absent this requirement, applicants would have an incentive to propose unneeded services in an attempt to gain comparative advantage. Both Celcom and MCI have demonstrated a public demand for at least some of their respective service features. In contrast, the record indicates that both CMS and AWACS failed to meet this standard; accordingly, neither will receive a preference for this sub-issue.[32]

35. *Rates and Charges.* The judge awarded CMS a slight preference for its proposed rate structure finding that its three-tiered pricing structure would foster more efficient use of the available spectrum and its system facilities. Moreover, CMS would use six-second incremental billing after the initial 30 seconds of each call, so that the subscriber is billed only for air time actually used. In contrast, Celcom and AWACS would compel their subscribers to pay for 100 minutes of air time, and along with MCI, proposed longer billing periods. *I.D.*, para. 89. We conclude that CMS' rate structure will best serve to promote the Commission's policy favoring usage-sensitive cost-based pricing and therefore affirm a

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for them, because MCI has done so. We find this disingenuous at best. It is difficult to treat seriously CMS' argument that need should not be a factor when at the same time it attempts to salvage a preference by relying on another applicant's need showing.

[32] The three service features that MCI would not offer (redial, speed calling, 911) are a function of the customer's mobile units and are not features of a particular licensee's system. Accordingly, MCI will not receive a demerit for failing to offer these features. In addition, the fact that many service features are a function of the customer's equipment further supports awarding only a slight preference for this sub-issue.

slight preference for CMS. *See Chicago Final Decision, supra*, at para. 48.

36. We disagree with CMS, however, that it should receive a preference for its rate levels. The applicant argues that its overall monthly bill for the average subscriber would be consistently and substantially lower at all levels of usage and during all periods of the day. The judge found, however, that CMS did not offer evidence establishing the methodology used in formulating its proposed charges, and thus their reasonableness cannot be determined. *I.D.*, para. 89. The judge's finding is supported by the record and, consistent with our decisions in other cellular cases where CMS has requested this preference, we affirm the judge's refusal to grant comparative credit for CMS' proposed rate levels. *Chicago Final Decision, supra*, at para. 49 and n.48; *Pittsburgh Final Decision, supra*, at para. 52.

37. *Maintenance.* The judge granted AWACS a slight preference for its maintenance proposal primarily because it was the only applicant to propose a comprehensive plan for a maintenance staff "dedicated solely to the cellular business." *I.D.*, para 92. Celcom and CMS except, arguing that AWACS did not discuss whether and to what extent it would train its employees, and asserting that each of them would have a fully trained staff.

38. We reverse the judge's award of a slight preference to AWACS for its maintenance proposal. In *Cellular Communications Systems, supra*, we stated that we did not expect maintenance proposals to present a significant issue in general. 86 FCC 2d at 502. The judge found that all of the Philadelphia applicants presented maintenance proposals that are theoretically acceptable. *I.D.*, para. 92. Our review of the record indicates that all four proposals are adequate and we do not believe that the differences relied on by the judge to support AWACS' preference, nor those advanced by Celcom and CMS to

obtain a preference, to be of decisional significance. Moreover, we cannot find that any of the proposals will measurably affect any applicant's ability to implement its system. *See Chicago Final Decision, supra*, at para. 51; *Seattle Final Decision, supra*, at para. 54. Accordingly, no preferences will be granted for maintenance proposals.

39. *Personnel, Policies and Facilities.* The judge found none of the applicants' proposals worthy of comparative credit for their personnel, policies and practices, and facilities. Celcom excepts regarding the practices of AWACS and MCI: (1) that the AWACS partnership arrangement between Metromedia and Lin Cellular Communications has the potential to generate disputes which could affect AWACS' ability to implement its proposals; and (2) that MCI should receive a demerit for its plan to integrate its maintenance staff and sales and customer service facilities for its cellular and long distance businesses. CMS asserts that it deserves a preference because it is partly owned by a minority enterprise. Both CMS and MCI seek a preference for their communications experience, personnel and ability rapidly to implement their proposals.

40. None of the exceptions discussed above warrant the award of preferences on this sub-issue. We agree with AWACS that there is no merit to Celcom's speculation as to its corporate structure and no evidence in the record to support its concerns. Similarly, Celcom's assertion that MCI's existing Philadelphia staff could not properly also handle cellular service is speculative and unsupported by the record. We also reject the arguments of CMS and MCI for preferences based on their corporate resources and experience. All four applicants have demonstrated comparable expertise. *See Chicago Final Decision, supra*, at n.27; *Gencom Incorporated (Phoenix Final Decision)*, FCC-84-476, released October 5, 1984, at para. 44. Finally, we have carefully considered CMS'

request for a preference in light of the partial minority ownership of Cellular Mobile Systems of Pennsylvania by Utility Telecommunications, Inc. The judge found that CMS should not receive comparative preference for Unity's participation since, in light of Unity's failure to establish its financial qualifications, its participation in the partnership is entirely speculative. *I.D.*, para. 91. CMS has not excepted to this finding. In any case, we have found in other cellular proceedings that no preferences for minority participation should be awarded in common carrier services. Such participation, while commendable as a general matter, has not been shown to be relevant to the public interest in licensing common carrier cellular systems. *See Cellular Mobile Systems of Tampa*, FCC 84-149, released June 8, 1984; *Cellular Lottery Decision* 49 Fed. Reg. 23628 at paras. 78-79 (1984).[33] Similarly, CMS' sensitivity to consumer views, while laudable, is not encompassed by the comparative issues and merits no preference.

41. In summary, our review of the judge's decision under issue (c) concludes that MCI and Celcom are each entitled to a slight preference for their proposed service offerings and that CMS deserves a slight preference for its rate structure.

Other Issues

42. *CMS/MCI Proposed Partial Settlement.* CMS and MCI have filed jointly an application for review of the Common Carrier Bureau's denial of their proposed partial settlement in this proceeding, *Celcom Communications Corporation of Pennsylvania, (Philadelphia Partial Settlement Order)* CC Mimeo 486, released October 28, 1983. In that decision, the Bureau denied the proposed partial settlement agreement because the settlement was

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[33] *See also* Chicago Final Decision, *supra*, at para. 52; Pittsburgh Final Decision, *supra*, at para. 53; Portland Final Decision, *supra*, at paras. 112-113.

filed after the I.D. was issued. CMS/MCI urge review,[34] arguing that the Bureau's action is in direct conflict with Commission policy and precedent encouraging settlements between mutually exclusive cellular applicants and that it would have a chilling effect on future settlements.

43. We will deny the CMS/MCI application for review.[35] Our policy of encouraging cellular settlements was initiated to avoid costly and time-consuming hearings and bring cellular service to the public as quickly as possible. *Cellular Reconsideration Order*, 89 FCC 2d at 77. We extended this policy to partial settlements because we felt this would simplify and expedite the conduct of comparative proceedings. *See, American Radio Telephone Service, Inc. (ARTS)*, 54 RR 2d 287 (1983). In this case, the hearing was completed and the initial decision was issued. Thus, a partial settlement here would not achieve any of the goals that we have been trying to achieve through settlements. For example, a post-I.D. partial settlement would not simplify or expedite the selection of a permittee; on the contrary, it would occasion further delay to reopen the record for amendment of the surviving application, rebuttal testimony, supplemental briefs and the issuance of a supple-

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[34] Pending review, CMS and MCI are prosecuting their individual applications.

[35] We will also deny CMS/MCI's joint application for review of the Bureau's denial of its request for a stay of all procedural dates pending Commission action on its application for review of the Bureau's denial of the partial settlement. The joint applicants have failed to meet the standards necessary to obtain this exceptional remedy, particularly, they have not demonstrated that they would be irreparably harmed by the continuation of the proceeding. Further delay could exacerbate the wireline headstart in this market, as well as delay the provision of service to the public, establishing that the public interest would not have been served by granting the CMS/MCI motion. *See* Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d. 921 (D.C. Cir. 1958).

mental decision.[36] Indeed, a policy of permitting post-I.D. partial settlements would encourage losing applicants to enter into such settlements in hope that the combined preferences of their separate losing applications would outweigh the individual preferences of the winning application, resulting in undue complications and delay and frustrating our attempts to bring cellular service to the public. No adjudicative proceeding can operate efficiently or fairly under such conditions.[37] Moreover, in contrast to CMS/MCI's claims, this decision has not had a "chilling" effect on settlements in other cellular proceedings.[38] Finally, the Bureau's decision did not decisionally change the outcome of this proceeding because the judge found that the proposed partial settlement would not have changed his decision. *I.D.*, note 1.

44. *Due Process.* In its exceptions, Celcom asserts that this proceeding was conducted in such a manner so as to deprive the applicants of an equitable and meaningful hearing, as required by *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), the Administrative Procedure Act and Sections 309 and 409 of the Communications Act, because the judge did not allow discovery or cross-examination by Celcom of certain AWACS

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[36] In contrast, a full settlement would not have required reopening of the record or further pleadings.

[37] The precedent cited by CMS/MCI is inapposite. In ARTS, we dealt with a partial settlement proposed before designation for hearing and also indicated that partial settlements during the pendency of a hearing should be encouraged. In Florida Telephone Company, FCC 84-42, released February 10, 1984, we indicated that we would impose no limitation upon an ALJ's discretion to consider a partial settlement proposed prior to issuance of an initial decision. We specifically did not rule on the question of a post-*I.D.* partial settlement such as that preesnted here.

[38] Post-designation nonwireline settlements have been achieved subsequent to the Bureau's action in other top-30 markets, *e.g.*, Miami, Kansas City, Dallas-Ft. Worth (partial settlements); Houston (full settlement).

witnesses. Celcom argues that these denials frustrated the development of a record upon which the best applicant could be selected. It further asserts that while cross-examination of a Celcom witness was permitted, the other applicants received the "benefit" of a paper hearing since their witnesses were not subject to the same level of inquiry.

45. We find that the procedures used in this proceeding were fully consistent with our expedited hearing procedures, 89 FCC 2d at 90-94, the Administrative Procedure Act, Sections 309 and 409 of the Communications Act and the requirements of due process. When we adopted those procedures, we explicitly left it to the judges to decide whether cross-examination was required to assure an adequate record. We conclude that the judge's decisions were not an abuse of his discretion, and that an adequate record was developed in this case.[39]

46. *Oral Argument.* Both CMS and Celcom have filed motions requesting that oral argument be held in this proceeding, arguing that this would provide the Commission with an opportunity to resolve several significant and relevant issues and clarify certain matters for future cellular decisions. We will deny the motions. As our decision here indicates, we believe that an adequate record has been developed upon which to decide this case and that oral argument would not further clarify the issues or contribute materially to the record already developed.

47. *Procedural Matters.* CMS has filed a motion to reopen the record seeking an opportunity to rebut certain conclusions first raised in the *I.D.*; *i.e.*, that its system

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[39] Celcom has made essentially the same meritless challenge to the hearing procedures used in the Pittsburgh and Seattle Proceedings. See Pittsburgh Final Decision, *supra*, at paras. 54-55; Seattle Final Decision, *supra*, at para. 58. *See also* Cellular Communications Systems, 86 FCC 2d 469, 499-501 (1981).

would suffer undue intra-system interference and that a fundamental principle of cellular design requires uniform spacing between cells. Since, we have overruled the judge's findings on these issues, any prejudice that CMS might have suffered as a result of the judge's findings has been removed. Accordingly, the motion will be denied. See *Seattle Final Decision, supra*, at para. 59.

48. CMS has also filed a petition to reopen the record alleging denial of due process because the Commission did not give applicants prior notice that survey methodologies would be compared. CMS' petition will be denied. CMS has ample notice of the designated issues. In *Cellular Communications Systems*, 86 FCC 2d at 502, we indicated the results of public need surveys would be considered. Clearly, consideration of results presupposes examination of the methodology.[40] Thus, CMS cannot now claim lack of notice.

49. CMS has also filed a petition for leave to amend its application under Section 1.65 of the Rules, to report the addition of an issue in the *Houston Nonwireline Cellular Proceeding* relating to the qualifications of its affiliate, Cellular Mobile Systems of Texas, to be a cellular licensee.[41] In response, AWACS filed a petition for condition of grant requesting that any authorization awarded to CMS in this proceeding be conditioned upon the resolution of the qualifications issue in the Houston proceeding. We will grant CMS' petition to amend; however, in light of our affirmance of the judge's decision granting the application of AWACS for the Philadelphia

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[40] In addition, Section 1.363 of the rules requires that all statistical studies offered in evidence in common carrier hearing proceedings be supported by a summary statement delineating the assumptions made and explaining the methodology used. This rule section by itself should have given CMS notice that the applicants' survey methodologies were subject to careful scrutiny.

[41] Memorandum Opinion and Order, FCC 83M-3774, released October 19, 1983.

nonwireline license, we conclude that AWACS' petition is moot and it will be denied.[42]

50. CMS has also filed a petition for leave to supplement its exceptions in which it seeks to have us consider its analysis of the precedents established in the Chicago and Pittsburgh Final Decisions. CMS' motion will be granted to the extent that we have taken into account our previous decisions in reaching a decision in this case. *See Phoenix Final Decision*, supra, at para. 45.

51. We will also grant AWACS' petition for leave to amend its application to reflect consummation of the transfer of control of Radio Broadcasting Company (a 24% shareholder in AWACS) to Metromedia, Inc. (a 25% shareholder in AWACS). Celcom argues that the record should be reopened in order to examine the anticompetitive effects of the acquisition. It asserts that AWACS' two partners (LIN and Metromedia) are potential if not actual competitors in offering paging service in the Philadelphia area and that allowing them jointly to operate a cellular carrier will lead to concentration of control and anticompetitive behavior in the paging market. We fully examined the impact of Metromedia's acquisition of Radio Broadcasting on the Philadelphia paging market nearly two years ago. *Radio Broadcasting and Metromedia, Inc.*, FCC 83T-2, released February 11, 1983. The relationship between Metromedia and LIN was known to Celcom at that time, but Celcom did not object to the Metromedia acquisition. Celcom's objection here is both late and filed in the improper forum.

Conclusion

52. Based on our review of the record in this case, we conclude that AWACS deserves moderate preferences

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[42] CMS has also filed petitions for leave to amend its application to report personnel changes and to update the list of licenses held by Graphic Scanning Corporation (its parent) as required by Section 1.65 of the Rules. We accept these amendments, although we have not considered them for comparative purposes in this proceeding.

under Issue (a) for its superior assessment of relative demand and its ability to accommodate local demand for service. AWACS also deserves a slight preference for its expansion plan. These preferences outweigh the slight preferences awarded CMS under Issue (a) for its area and population coverage and under Issue (c) for its proposed rate structure as well as the slight preference awarded MCI under Issue (a) for its assessment of relative demand and under Issue (c) for its proposed service offerings. Accordingly, we conclude that on a comparative basis AWACS' application is superior to those of Celcom, CMS and MCI and that the public interest, convenience and necessity will be better served by the grant of AWACS' application. Therefore, the *I.D.* is affirmed, as herein modified.

53. Accordingly, IT IS ORDERED, that the application of Automatic Wide-Area Cellular Systems, Inc., File No. 26084-CL-P-(18)-82 is GRANTED [43] and the applications of Celcom Communications Corporation of Pennsylvania, File No. 26164-CL-P-(16)-82; Cellular Mobile Systems of Pennsylvania, File No. 26188-CL-P-(16)-82; and MCI Cellular Telephone Company, File No. 26113-CL-P-(13)-82 ARE DENIED.

54. IT IS FURTHER ORDERED that the Joint Applications for Review filed by CMS and MCI are DENIED.

55. IT IS FURTHER ORDERED, that the Motions for Oral argument filed by CMS and Celcom, the Motion to Reopen the Record filed by CMS, the Petition to Reopen the Record filed by CMS, and the Petition for Condition of Grant filed by AWACS are DENIED.

56. IT IS FURTHER ORDERED that the Petition for Leave to File and Supplement to Exceptions filed by

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[43] This grant is conditioned upon the permittee obtaining the appropriate antenna structure clearances.

CMS is GRANTED to the extent indicated herein, and DENIED in ALL OTHER RESPECTS.

57. IT IS FURTHER ORDERED that the three Petitions for Leave to Amend under Section 1.65 filed by CMS and the Petition for Leave to Amend under Section 1.65 filed by AWACS are GRANTED and the amendments submitted by CMS and AWACS are accepted.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 83-25

IN RE APPLICATIONS OF

File No. 26164-CL-P-(16)-82

CELCOM COMMUNICATIONS CORPORATION
OF PENNSYLVANIA

File No. 26084-CL-P-(18)-82

AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

File No. 26188-CL-P-(16)-82

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA

File No. 26113-CL-P-(13)-82

MCI CELLULAR TELEPHONE COMPANY

For a construction permit to establish a new cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Philadelphia, Pennsylvania Standard Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted August 12, 1985; Released August 22, 1985

By the Commission: Commissioner Dawson concurring in the result.

1. Celcom Communications Corporation (Celcom) has filed a Petition for Reconsideration of the Commission's

Final Decision in this proceeding, *Celcom Communications Corporation*, FCC 84-649, released January 8, 1985, *appeal docketed sub nom. Cellular Mobile Systems v. FCC*, No. 85-1070 (D.C. Cir. Feb. 4, 1985). Automatic Wide-Area Cellular Systems, Inc. (AWACS) has filed an opposition to Celcom's petition, and Celcom has filed a Reply.

Background

2. In our *Final Decision*, we affirmed with modifications the *Initial Decision* (I.D.) of Administrative Law Judge Joseph Chachkin, *Celcom Communications Corporation*, FCC 83D-54, released September 16, 1983. The I.D. granted AWACS' application and denied the mutually exclusive applications of Celcom, Cellular Mobile Systems of Pennsylvania (CMS), and MCI Cellular Telephone Company (MCI). The I.D. concluded that AWACS' application was superior under designated issues (a) and (b) and that grant of AWACS' application would best serve the public interest, convenience, and necessity.[1] Celcom, CMS, and MCI filed exceptions to

[1] The applications were designated for comparative hearing on the following issues: (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service; (b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service; (c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and (d) to determine in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity. Advanced Mobile Phone Service, Inc. (Philadelphia Designation Order), 52 RR 2d 1593 (Com. Car. Bur. 1983) (Footnotes omitted). Two addi-

the I.D. We concluded that AWACS was entitled to moderate preferences under Issue (a) for its assessment of relative demand and its ability to accommodate local demand for service. We further concluded that AWACS was entitled to a slight preference under Issue (b) for its expansion plan. These preferences awarded to AWACS under the major issues outweighed slight preferences awarded to CMS under Issue (a) for its area and population coverage and Issue (c) for its proposed rate structure, to MCI under Issue (a) for its assessment of relative demand and Issue (c) for its proposed service offerings, and to Celcom under Issue (c) for its proposed service offerings.

3. Celcom contests the three preferences awarded to AWACS, arguing that each one is dependent upon the superiority of AWACS's demand study and that we erred in our evaluation of the study's relative merit.

Discussion

4. *Assessment of Relative Demand.* Celcom argues that we should not have awarded AWACS a preference for its superior assessment of relative demand, because the AWACS study was flawed in ways that have prevented other applicants in other markets from receiving preferences. First, Celcom argues that AWACS' survey results do not deserve a preference, because the highest monthly cost quoted to survey respondents was lower than the monthly charge projected in the AWACS business plan. Allowing a preference here, Celcom contends, is inconsistent with our *Final Decision* in *New Orleans*,[2]

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tional issues were designated against original applicant Unity Telecommunications Systems, Inc. (Unity), but these were later rendered moot when Unity's application was dismissed as a result of its merger with CMS.

[2] Mid-America Cellular Systems, Inc., FCC 84-648, released January 10, 1985.

where an applicant who incorrectly informed survey respondents about the proposed cost of its service was not awarded a preference for relative demand.[3] Second, Celcom asserts that the results of AWACS' need study are impaired because AWACS conducted more than one survey and relied upon the one forecasting the higher need. Celcom argues that allowing AWACS a preference under these circumstances conflicts with our *Seattle Final Decision*,[4] where a preference was denied to an applicant who submitted two contradictory demand studies. Third, Celcom asserts that AWACS should not have received a preference for relative demand because in projecting demand it disregarded the results of its own residential survey showing substantial demand and instead relied solely on one of its two surveys of businesses. Celcom relies upon the *Phoenix Final Decision*,[5] where an applicant was denied a preference for having ignored the potential for residential demand.[6]

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[3] The applicant, however, still was awarded a preference for its ability to accommodate local demand.

[4] American Mobile Communications of Washington and Oregon, 56 RR 2d 1090 (1984).

[5] Gencom Incorporated, 56 RR 2d 1597 (1984).

[6] Celcom also attacks the AWACS marketing study as being inconsistent with one conducted by the same consultant in New York for one of AWACS' parent corporations. The alleged inconsistencies were fully explained, however, by AWACS, which discussed how certain differences between the New York and Philadelphia markets dictated disparate marketing assumptions for the two markets. AWACS Surrebuttal Ex. 1A. The judge discounted Celcom's argument, I.D. at note 163; and we agree that because each market is unique, there can be no requirement that an applicant employ identical studies in every market for which it files an application. Celcom further questions AWACS' market study results because AWACS showed an excessively wide range of probable demand for service. AWACS reasonably explained the basis for the demand figures and calculations it used, and we find nothing in this regard to justify modifying AWACS' preference. *See* Initial Decision at paras. 19 and 73; *see also* AWACS Direct Case, Ex. 2 at II.E.3-

5. Celcom's reliance on our *New Orleans, Seattle* and *Phoenix Final Decisions* indicates that it misinterprets the purpose of this comparative proceeding. As we stated in our *New York Reconsideration*[7] in response to arguments by Celcom similar to those it makes here, our purpose is to compare the non-wireline applicants with the other applicants in the same market, not with applicants in other markets. The shortcomings in AWACS' marketing study, which were noted and taken into account in the I.D. and our Final Decision, are less serious than those found in the other applications. Indeed, AWACS' deficiencies are minor in comparison with the flaws exhibited in Celcom's public need showing, which we found to be so patently defective as not to warrant comparative credit.[8]

6. In any event, we are unpersuaded by Celcom's arguments. We considered the inconsistency between the cost for cellular service proposed in AWACS' need surveys and that proposed in its business plan when rendering

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II.E.5. Celcom additionally raises an argument made by CMS in its exceptions—that applicants had no prior notice that demand survey methodologies would be compared for the purpose of awarding preferences. We rejected the identical argument in our Final Decision, paras. 47-48; in the Seattle Final Decision, at para. 60; in the New Orleans Final Decision, at para. 49; and in the Tampa Final Decision, Cellular Mobile Systems of Tampa, FCC 85-231, released May 10, 1985, at para. 46. In each case we explained that in Cellular Communications Systems, 86 FCC 2d 469, 502 (1981), we indicated that the results of public need surveys would be considered. Consideration of results presupposes examination of methodology. We also rejected the same argument in our Chicago Reconsideration, Rogers Radiocall, Inc., 56 RR 2d 951, para. 10 (1984), where, in its earlier pleadings, the applicant had indicated that it was on notice that demand survey methodologies would be compared.

[7] Celcom Communications Corporation, FCC 85-206, at para. 8, released April 30, 1985.

[8] I.D. at para. 74; Final Decision at para. 17.

our Final Decision and concluded that this discrepancy, when examined in conjunction with other minor defects in AWACS' need study, justified a reduction in the degree of AWACS' relative demand preference from substantial to moderate.[9] Celcom's citation of *New Orleans* does not persuade us to further reduce AWACS' preference because, unlike AWACS, the New Orleans applicant relied on a demand study with other major defects beyond incorrectly informing survey respondents about the proposed cost of service. Notably, the application surveyed predominantly high income households but applied the results to the general populace, and it improperly estimated business demand from a residential projection base.

7. Celcom similarly fails to demonstrate that our *Final Decision* in *Seattle* justifies a different result here. The Seattle applicant made no attempt to reconcile the differences between its conflicting demand studies, nor did it explain why one survey was selected over the other. AWACS, on the other hand, provided an adequate rationale for its selection of what it termed its "primary" public need survey. AWACS explained that its reliance upon the primary survey, which was its only survey premised upon the leasing of equipment to subscribers, was justified by data indicating a strong preference for leased rather than customer owned equipment.[10]

8. Celcom's reliance upon our *Phoenix Final Decision* is also misplaced. The Phoenix applicant offered us no basis for its failure to survey potential residential customers or to consider them in projecting demand.[11]

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[9] Final Decision at para. 16. We note that while Celcom contends that it introduced evidence of the AWACS business plan in its rebuttal testimony (at Celcom Rebuttal Ex. 18 at 12), the plan was not admitted into evidence by the judge. Tr. 103.

[10] *See* AWACS Direct Case, Vol. III at IV.A.1-2.

[11] Phoenix Final Decision at paras. 14 and 17.

AWACS, conversely, explained that while it conducted a residential survey, it did not incorporate the results into its demand forecasts because of its assumption that in the initial stages of service its market would primarily consist of business users.[12] AWACS demonstrated that it exercised business judgment in making demand projections; the *Phoenix* applicant did not. Moreover, we considered this point when it was raised in the exceptions and relied on it in part in reducing AWACS' substantial preference to a moderate one in our *Final Decision.*[13] Again, Celcom has not persuaded us that a further reduction is warranted.[14]

9. *Ability to Accommodate Local Demand.* Celcom attacks the moderate preference AWACS was awarded for its ability to accommodate local demand, arguing that because we have identified the critical comparative factor under this issue as the nexus between an applicant's market research and its cellular design,[15] a preference cannot properly stand where the demand survey has no

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[12] AWACS Direct Case, Vol. III at I.B.1-2. AWACS explained further that this assumption was based on the current makeup of the types of users of mobile telephones and paging services and the fact that cellular service initially would be relatively expensive.

[13] *Supra,* para. 6 and note 9.

[14] Celcom also relies upon our Final Decision in Cincinnati, Southern Ohio Telephone Company, FCC 85-9, released January 17, 1985, in attacking AWACS' neglect of residential demand. That decision provides Celcom with even less support than Phoenix. In Cincinnati the losing applicant not only excluded non-business customers but surveyed only a limited segment of business users and failed to demonstrate that it had used its survey and other demographic evidence to distribute demand. Para. 10. In contrast, the preferred applicant's study was far more comprehensive and provided a full explanation of its methodology. In fact, in noting our approval of that applicant's use of census tract data to identify areas of potential demand, we referred to our Final Decision here where AWACS alone had similarly utilized census tract data. Para. 12.

[15] *See, e.g.,* Final Decision at para. 21.

value. Celcom also disputes AWACS' eligibility for this preference because the AWACS system design suffers from a service gap caused by an "orphan cell," i.e., one not connected to the rest of the system. Celcom relies on the *Atlanta Final Decision*,[16] where an applicant failed to receive a preference under the issue of geographic area and population because of a service gap.

10. We reject Celcom's first argument, for the reason that the AWACS demand study was the best among those of the competing applicants and was, as we here reaffirm, deserving of a moderate preference. Celcom's orphan cell argument is equally unavailing. The small area left unserved by the AWACS gap is located in a state forest and is traversed by no major highways. We will not penalize an applicant for its decision not to serve an area of negligble demand.[17]

11. *Expansion Plans.* Celcom disputes AWACS' slight preference under this issue, claiming that the preference depends wholly upon our conclusion that AWACS' submitted the best demand research and that the preference cannot survive in view of the fact that AWACS' subscriber forecast has no "semblance of value." [18] Celcom merely repeats the argument it makes regarding AWACS' ability to accommodate demand, *supra* at para. 9, and does not attempt to find a deficiency in the AWACS expansion plan *per se.* Our response is, as be-

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[16] Celcom Communications Corporation, FCC 85-15, released January 29, 1985.

[17] Celcom has ignored the fact that in the Atlanta decision we also affirmed the award of a preference for geographic area and population to an applicant whose system design had a small service gap which contained few people and was not crossed by major highways. In any event, we note that AWACS received only a moderate preference for accommodation of local demand. I.D. at para. 77.

[18] Celcom Petition, page 16.

fore, that AWACS presented us with the best demand study in the *Philadelphia* non-wireline proceedings.[19]

Conclusion

12. We affirm our decision that the grant of AWACS' application would best serve the public interest, convenience, and necessity. Celcom's petition does not present any matters which would warrant reconsideration but merely repeats arguments made in its exceptions which we considered fully and rejected in our *Final Decision.*

13. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Celcom IS DENIED.

14. IT IS FURTHER ORDERED, that the grant of the application of AWACS, File No. 26084-CL-P-(18)-82, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
Secretary

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[19] See the *Final Decision* at para. 31, where we affirmed the judge's finding that AWACS' expansion plan is well-developed and market specific and that it takes its demand projections into account on a step-by-step basis.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

No. 85-1070

CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA

v.

FEDERAL COMMUNICATIONS COMMISSION

And Consolidated Case Nos.
85-1079 and 85-1594

[Filed Aug. 25, 1986]

Before: MIKVA, EDWARDS and SCALIA, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of Celcom Communications Corporation of Pennsylvania, filed July 25, 1986, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-1131

CELCOM COMMUNICATIONS CORPORATION OF GEORGIA,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

CELLULAR MOBILE SYSTEMS OF GEORGIA,
GENCOM CELLULAR OF ATLANTA,
Intervenors.

Argued Feb. 14, 1986

Decided April 4, 1986

Notice of Appeal from an Order of the
Federal Communications Commission

S. William Livingston, Jr., with whom Jonathan D. Blake and Alan A. Pemberton, Washington, D.C., were on brief, for appellant.

Steven A. Weiss, Counsel, F.C.C., with whom Jack D. Smith, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel and Roberta L. Cook, Counsel, F.C.C., Washington, D.C., were on brief, for appellee.

Eliot J. Greenwald, with whom Ben C. Fisher and John Q. Hearne, Washington, D.C., were on brief, for intervenor, Gencom Cellular of Atlanta.

Edward P. Taptich, William K. Keane and Laura C. Mow, Washington, D.C., were on brief, for intervenor, Cellular Mobile Systems of Georgia.

Before WALD, STARR and SILBERMAN, Circuit Judges.

Opinion PER CURIAM.

PER CURIAM:

This case is the fourth of a series of appeals from cellular telephone licensing decisions of the FCC. The setting before us today is the Atlanta, Georgia market. The FCC awarded the Atlanta license to Gencom Cellular of Atlanta (Gen-Cell),[1] to the dismay of the challengers now before us. Many of the arguments advanced by the appellant, Celcom Communications Corporation of Georgia (Celcom), and the intervenor, Cellular Mobile Systems of Georgia (CMS), were raised by their corporate affiliates in prior proceedings before this court. To the extent that such issues were resolved in our opinions in the *Pittsburgh*[2] and *Chicago*[3] proceedings, they will not be revisited here.

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[1] Gen-Cell is a partnership of two of the initial applicants in the Atlanta proceeding, Gencom, Inc. and Maxicom, Inc. Just prior to the hearing, the ALJ approved the merger, accepted amendments to Maxicom's application which substituted the partnership as the new applicant, and dismissed Gencom's application. *Order*, FCC 83M-3796 (Oct. 25, 1983).

[2] *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182 (D.C. Cir. 1985) (*Pittsburgh*). Celcom Communications Corporation of Pittsburgh, Inc. intervened in the Pittsburgh appeal and filed a brief on the merits, but withdrew entirely from the case shortly before oral argument.

[3] *Cellular Mobile Systems of Illinois, Inc. v. FCC*, 782 F.2d 214 (D.C. Cir. 1985) (*Chicago*).

I

The principal legal challenge maintained by Celcom relates to the FCC's comparative determination of geographic and population coverage. Celcom's criticism attacks the FCC's decision on two levels. First, Celcom argues that subsequent pronouncements of the FCC have wholly undermined any asserted public interest which the "coverage" criteria may once have embodied. Second, and more narrowly, Celcom attacks the FCC's use of contour coverage as the yardstick for its comparative measurement of the applicants' geographic and population coverage. After full consideration, we conclude that the preference awarded Gen-Cell for coverage is supported by substantial evidence and is neither arbitrary nor capricious.

The FCC has repeatedly affirmed that geographic and population coverage is a "major basis of comparison" of cellular applications.[4] Gen-Cell, the victor in this license proceeding, had beyond cavil the greatest area and population coverage as measured by the FCC. Celcom does not attack the substantiality of the evidence supporting that preference. Nor could it reasonably do so, inasmuch as Gen-Cell's proposal indisputably covered 90,726 more people and 330 more square miles than Celcom. *Celcom Communications of Georgia, Inc.*, FCC 85-15, at 5 (Jan. 29, 1985) (Atlanta Final Decision, hereinafter *Atlanta*). Instead, Celcom argues that the differences in relative coverage relied upon by the FCC do not reflect "substantial public need." Brief at 41-42. In a supplemental brief, Celcom adds that it was not on notice that the standard of comparison was what it perceives as a sim-

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[4] *See Cellular Communications Systems*, 86 F.C.C.2d 469, 502 (Report and Order), *modified*, 89 F.C.C.2d 58 (1981), *further modified*, 98 F.C.C.2d 571 (1982); *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (*Cellular Rulemaking*).

plistic rule of "more coverage is better." Supplemental Brief at 10.

We cannot agree in either respect. The FCC concluded, reasonably, that Gen-Cell's coverage was not only quantitatively greater but that its pockets reflected substantial need. Gen-Cell's pocket superiority was strengthened by its inclusion of Lake Lanier; it is undisputed that that facility draws over 16 million visitors annually. *Atlanta*, at 6 n.8. The FCC found that a popular recreational area is "likely to have high mobile usage characteristics," a "significant factor" under *Cellular Rulemaking*. 86 F.C.C.2d at 502. Crediting service to Lake Lanier is, in our view, no different conceptually than crediting service to an airport or a major highway. Moreover, the difference in coverage offered by the respective parties is greater than that in *Chicago*. At 226-27. It was reasonable for the FCC to conclude, on this record, that Gen-Cell's coverage merited comparative credit.

Celcom contends that the comparison of coverage bears no relation to the public interest, not simply because such differences are "relatively minor," an argument addressed in *Chicago*, at 225-26, but because recent pronouncements by the FCC herald the deregulation, as it were, of cellular coverage. *See* Public Notice No. CL-175 (Nov. 23, 1984). According to Celcom, a cellular licensee is now at liberty to alter its contour coverage or its cellular geographic service area (CGSA) so long as the SMSA is not exceeded. At oral argument, Celcom denied that it was mounting an attack on the *original* comparative criteria; to the contrary, Celcom claimed that recent statements emanating from the Commission itself sapped the comparative criteria of any meaningful public-interest content.

We are persuaded that Celcom's creative analysis, when fairly viewed, mischaracterizes the FCC's position.

The recent Public Notice, which describes what changes to a cellular system are "major," "minor," and "permissive," simply tracks the language of *Cellular Rulemaking*. *Compare* Public Notice No. CL-175 (Nov. 23, 1984) *with* 86 F.C.C.2d at 509-10. In its emphasis on flexibility, the *original* rulemaking provided that any applications proposing to alter CGSA boundaries would be "*major*" applications; that alterations in transmitter locations would be "*minor*" and thus would require prior approval in part to ensure FAA clearance;[5] and, finally, that changes in frequency utilization would be "permissive." As we see it, Celcom's criticism in this respect ultimately reduces to an attack on the comparative criterion itself. Celcom has had an opportunity to advance this argument on numerous occasions: in the *Cellular Rulemaking* itself; in the several Reconsiderations and on appeal to this court from that rulemaking; on appeal to the Commission of the Designation Order in this proceeding; or in a motion before the agency to expand the issues.[6] Celcom failed to do so. It is simply too late in the day to attack the comparative process itself or a comparative criterion which went unchallenged at the time it was adopted.

Celcom attempts to reinforce its argument with references to the Commission's later adoption of a lottery to replace the comparative process in markets below the top thirty. Celcom characterizes the FCC's explanations as, in effect, the confessions of a penitent regulatory agency which has belatedly recognized the public-interest bankruptcy of the comparative process. Taken in context,

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[5] The Public Notice reiterates that these are minor changes and expands the prior-approval provision to require approval *only* if there is a need, such as for FAA clearance or an environmental impact statement.

[6] Celcom's corporate affiliate, which eventually withdrew from the appeal, *see* n. 1 *supra*, also failed to raise this challenge in *Pittsburgh*.

however, the FCC's language reveals that the lottery decision was reached not because the comparative process was deemed incapable of identifying the best applicant in the larger markets but because the difficulty, expense, delay, and administrative burden attendant to comparative proceedings had become too high. *Cellular Lottery Selection*, 56 Rad. Reg. 2d (P & F) 8, 13-21 (1984).

We also reject Celcom's attack on the comparative measurement of contour coverage—as opposed to CGSA coverage—as the requisite point of reference. The FCC's comparison of contour coverage is not, as Celcom would have it, contrary to the criterion enunciated in *Cellular Rulemaking*. The major basis of comparison set forth there was "the geographic area that an applicant *proposes* to serve," or the "proposed service area." 86 F.C.C. 2d at 502 (emphasis added). The very regulation which provides that the CGSA "shall be defined by the applicant as the area *intended* to be served," 47 C.F.R. § 22.903(a) (1982) (emphasis added), goes on to state that the CGSA has two limited purposes, namely determining mutual exclusivity as to other systems and establishing standing for those who assert adverse effects. *Id.* § 22.903(b). Nothing in the rules requires that the CGSA be the basis of comparison of relative coverage.

The use of contours, moreover, is reasonable. Contours measure the actual coverage which the applicant will provide with the system as designed, while the CGSA represents not the area which the applicant *proposes* to serve, but the potential boundaries of the applicant's license.[7] What is more, both traditional FCC

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[7] Even though the FCC has acknowledged the unreliability of the contours when employed for other purposes, it is too late in the day for Celcom to attack the use of Carey contours here. *See Pittsburgh*, at 187 n. 9. The contours were not challenged on reconsideration or appeal of *Cellular Rulemaking*. Nor did Celcom attempt to challenge the use of Carey contours either by appealing the Designation Order or by seeking to enlarge the issues. *See Chicago*,

practice and the cellular rulemaking indicated that contours would be the likely basis of comparison. Traditionally in radio comparative proceedings, including domestic public land mobile radio proceedings, coverage has been compared by examining the "reliable service area" of the applications, as measured by the field strength contours of the stations. *See, e.g.*, 47 C.F.R. § 21.504 (1958) (currently codified at 47 C.F.R. § 22.504 (1985)). In the cellular rulemaking NOPR, the FCC proposed to employ the traditional land mobile comparative criteria, such as area and population coverage, for cellular radio as well. *Cellular Communications Systems*, 78 F.C.C.2d 984, 1000 (1980) (NOPR). This criterion, among others, was adopted; in its cellular rules, the FCC continued to measure "reliable service area" according to the traditional contour measure. 47 C.F.R. § 22.903(c) (1982). Thus, the same rule that defines CGSA also requires that the 39 dBu contours be shown, *id.* § 22.903(a); that the Carey method be used to depict the contours "for the purpose of establishing the reliable service area of a station," *id.* § 22.903(c); and that the applicant demonstrate that the combined 39 dBu contours will cover at least 75% of the CGSA. *Id.* § 22.903(a).

In addition, Celcom's own application indicates that it expected that the parties' respective 39 dBu contours would be compared. The first page of Celcom's engineering statement includes a "Discussion of Coverage and Cellular Geographic Service Area (CGSA)," and discusses the "39 dBu coverage for the cellular plan" in relation to the CGSA. Celcom Engineering Statement, at 1 (June 1982). The accompanying exhibit, Map 1, identifies the *39 dBu contour area* as the "Area of Proposed

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at 225 n. 19. Moreover, the rules themselves permit an applicant to utilize an alternative method when it believes that the Carey method is inaccurate. 47 C.F.R. § 22.903(c) (1982). Celcom never exercised this option.

Coverage," and contrasts it against the "Area of Proposed CGSA" in demonstrating that the 75% requirement had been met.

Celcom raises several additional arguments in this respect. The first is that contour coverage differences are merely design differences which should be ignored, by virtue of the fact that licensees will be able to modify their proposed designs to meet the exigencies of implementation. This broadside ignores the specific context—cellular design and cell spacing—in which the FCC has declared its intention not to dictate design choices. Celcom's design-difference argument, when advanced in the coverage context, leads to the extraordinary proposition that all issues are, in the end, merely design differences, precluding any effective comparison.[8] This proves far too much. Coverage is not a mere matter of design; it is the very goal of the systems being planned. Coverage is explicitly stated by the rules to be a *major* comparative criterion. The undeniable fact remains that Celcom proposed a smaller system than Gen-Cell, indeed, a system so much smaller that it would fail to serve over 90,000 people covered under Gen-Cell's proposal.

Celcom next claims that it was unfairly penalized by the FCC's coverage rule which, as Celcom sees it, awards aggression over caution. The pertinent FCC rule permits only *de minimis* extensions of CGSA beyond SMSA boundaries. 47 C.F.R. § 22.903(a) (1982); *see Pittsburgh*, slip op. at 10. The rule exists because of the obvious fact that radio signals do not respect political boundaries; *de minimis* extensions are often needed to ensure full coverage of a desired portion of the SMSA. In our view, Celcom had adequate notice of the criteria which would govern the FCC's evaluation of such extensions. *See* Public Notice: Cellular Application Filing

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[8] This is, of course, an implicit theme to which Celcom frequently returns—that the comparative process itself is, in effect, invalid.

Procedures, at 1-2 (Mar. 24, 1982). Contrary to Celcom's claim, Gen-Cell was credited only for the area it covered within the SMSA; the *de minimis* extensions were not included. Celcom does not argue that the rule was enforced in an arbitrary fashion, but only that, in attempting to comply with the rule, it chose not to gamble and in the end lost. Celcom must live with its strategic choices.

II

Celcom's second major challenge is to the FCC's award of a slight preference to Gen-Cell for its relative demand determination. Celcom claims that the FCC erred in rejecting the ALJ's finding that no substantial evidence justified such a preference.[9]

The FCC rejected the ALJ's criticism of Gen-Cell's sample source (the Yellow Pages) and low positive response rate, finding instead that Gen-Cell's sample source and methodology were reasonable. *Atlanta*, at 10.[10] Gen-Cell had "fully explained" its assumptions and

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[9] Celcom also argues that it had no notice that a separate preference would be awarded on the basis of the reliability of the applicants' respective market survey methodologies. The identical arguments were raised by CMS affiliates in *Pittsburgh* and *Chicago*. *Pittsburgh*, at 202-05; *Chicago*, at 215. In those opinions, this court emphatically rejected the argument that the Designation Orders departed from the standards announced in *Cellular Rulemaking* "by making demand studies the subject of a separate preference and by basing the evaluation of an applicant's 'ability to accommodate demand' on the extent to which system planning reflected demand." *Pittsburgh*, at 202-03, *Chicago*, at 222-23. Celcom fails to demonstrate that the analysis set forth in detail in our prior opinions is not fully controlling here.

[10] A similar sample size was found to be sufficient in the *Chicago* proceeding. *Rogers Radiocall, Inc.*, 96 F.C.C.2d 1172, 1179-80, *reconsideration denied*, 98 F.C.C.2d 1293 (1984), *aff'd, Cellular Mobile Systems of Illinois, Inc. v. FCC*, 782 F.2d 214 (D.C. Cir. 1985). Moreover, comparative credit will not be denied simply because an otherwise satisfactory survey is limited to businesses when the applicant has stated that assumption clearly; has not attempted to

methodology, *see* Initial Decision, FCC 84D-13, at 12-13 (Feb. 27, 1984); Gen-Cell Direct Exh.L, at 6-9, and the FCC found no serious methodological errors. Gen-Cell's survey was simple and straightforward, yielding demand data at different proposed prices. Gen-Cell Direct Exh. L, at 23.

The ALJ's primary criticism was that Gen-Cell had failed to demonstrate a nexus between its demand survey and its projection and distribution of demand; the ALJ observed that the growth rate employed in the demand projections could not be derived from the survey. Initial Decision, at 13, 29. The Commission, on the other hand, concluded that "any market demand study must contain certain assumptions which are not susceptible to proof in order to account for all relevant factors." *Atlanta*, at 10; *Pittsburgh*, at 207 & n. 53. The FCC went on to conclude that Gen-Cell's demand survey was indeed utilized to distribute demand throughout its system. These conclusions, we are persuaded, are adequately supported by the record. Gen-Cell's demand-survey data, Gen-Cell Direct Exh. L, at 24, served as a launching point for its demand forecasts, Gen-Cell Direct Exh. G, at 2, 6, which relied as well upon other growth-related assumptions and demographic data. Gen-Cell Direct Exh. G. All important assumptions were explained, rather than left to the Commission's speculation. *Atlanta*, at 10; Initial Decision, at 13; Gen-Cell Exhs. G, K, L.[11]

Moreover, serious inadequacies plagued both Celcom's and CMS's demand studies. The ALJ characterized Celcom's demand analysis as "patently defective," Initial Decision, at 28; to its credit, Celcom readily concedes

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project residential demand from business-derived data; and all other applicants have likewise limited their surveys to businesses. *See Chicago*, at 217, 218-19.

[11] A similarly qualitative explanation of projected demand was found adequate in *Pittsburgh*. At 208 n. 54.

that its survey was intended neither to be statistically valid nor to serve as the basis of its demand forecast. *Id.* at 28-29. As to CMS, Celcom's proposed partner, the demand analysis it utilized was found wanting in *Pittsburgh*, at 206-07 and *Chicago*. 96 F.C.C.2d at 1179-81. As in those applications, CMS's demand forecast for Atlanta, based as it was upon a model, was entirely unrelated to any of its surveys of demand in Atlanta. Given those defects in the competitors' studies, it was reasonable for the FCC to determine that Gen-Cell's survey, although not ideal, was comparatively better by a slight margin.

III

In its final line of atack, Celcom raises a trio of claims of abuse of discretion on the part of the ALJ and the Commission. We find each of them unavailing.

First, Celcom argues that the ALJ abused his discretion in denying Celcom's request for cross-examination of Gen-Cell's officials on the efficacy of the new Gen-Cell partnership proposal. Under the Commission's rules, the "[d]etermination of what, if any, cross-examination is necessary is within the sound judicial discretion of the [ALJ]." 47 C.F.R. § 22.916(b)(6) (1985). The pertinent standards for exercise of this discretion under the cellular rules, as well as the APA, have been amply elaborated in *Pittsburgh*. At 197-99; *see generally American Public Gas Association v. Federal Power Commission*, 498 F.2d 718, 723 (D.C.Cir.1974); 5 U.S.C. 556(d) (1982); 47 C.F.R. § 22.916(b)(6) (1985). Suffice it to say that Celcom's cursory assertions that "[t]hese are matters within Gencom's knowledge, and written testimony may not be a fully effective substitute for cross-examination," Objections to Revised Direct Case, at 3 (Sept. 26, 1983), fail to satisfy the more exacting standard imposing the burden on the requesting party to demonstrate the need for cross-examination.

Celcom next contends that the ALJ improperly permitted Gen-Cell to upgrade its application by amending it to include approximately eight lines of text describing Gen-Cell's plan for assigning signalling channels. *See* Gen-Cell Motion for Leave to Amend Application, at 9-10 (Mar. 4, 1983). Under the rules, major amendments proffered after the Designation Order are permitted only by leave of the ALJ upon demonstration of good cause. 47 C.F.R. § 22.23(b) (1982); 47 C.F.R. § 22.918(b)(3) (1982) (recodified at 47 C.F.R. § 22.918 (c)(4) (1985)); *see Cellular Communications Systems*, 89 F.C.C.2d 48, 91 (1982) (Order on Reconsideration). The ALJ found that Gen-Cell's claim of inadvertent omission flowing out of a clerical error, Motion for Leave to Amend, at 9-12 & Exh. 10, constituted good cause for acceptance of the amendment. Order, FCC 83M-995, at 2 (Mar. 28, 1983).

Celcom argues that, notwithstanding Gen-Cell's disclaimer of comparative credit, *id.* at 2 & n. 3, the very acceptance of an amendment rendering operable a theretofore nonfunctioning system had the forbidden effect of upgrading Gen-Cell's proposal. Both the ALJ and the Commission properly rejected this contention, explaining that the evil of "one-upmanship" [12] was not implicated and that no comparative credit had been awarded for that aspect of Gen-Cell's plan. "Since the amendment merely corrected an error to properly express what Gen-Cell's plan had always been, no comparative upgrading is involved." Initial Decision, at 16 n. 32; *Atlanta*, at 21.

Celcom concludes its final line of attack with the claim that the Commission abused its discretion in refusing to permit a last-minute amendment of Celcom's application to reflect a stock agreement between Celcom and CMS. We disagree. The Commission's rules, as we have just seen, provide that such amendments may be filed only

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[12] *See Pittsburgh*, at 185, 210 n. 56.

with leave of the ALJ upon a showing of good cause by the party seeking the amendment. Under the rules, the Commission could reasonably conclude that it would be in the public interest to accept such an amendment if (1) it were not untimely; (2) "good cause" to amend were shown; and (3) the new entity (Celcom/CMS) would have been able to seek comparative credit for a joint application which better served the public interest than the original applications. Under the circumstances before us, the findings of the Common Carrier Bureau and the Commission as to the lack of "good cause" were not unreasonable. *Atlanta*, at 19-20 & nn. 20-21; *Order*, Mimeo 4994, CC Docket No. 83-35, at 1-2 (Common Carrier Bureau June 22, 1984). This partial settlement was proposed not only after the ALJ's Initial Decision had been rendered but after all parties had filed their Exceptions to the decision. It was, moreover, a proposed settlement between the two *losing* Atlanta affiliates; according to the parties, the only result of the settlement would be that CMS would drop its own appeal. Finally, Celcom/CMS *expressly disclaimed* any comparative credit arising out of the partial settlement, Application for Review, at 2, 4-5 (July 13, 1984); in any event, such credit is, as we have already observed, precluded by the "one-upmanship" prohibition of the rules.

As we read the record, the Commission's action had no impact on the partial settlement itself, which may proceed with or without FCC sanction; the Commission concluded only that "good cause" had not been shown to permit a losing party to amend its application to reflect a stock agreement. This action scarcely rises to the level of a reversible abuse of discretion. The FCC reasonably found that a belated amendment of this sort did nothing to advance the goals of the cellular settlement policy but would, to the contrary, spawn yet further delays in a delay-ridden process.

IV

In summary, we conclude that the comparison of geographic and population coverage within the parties' respective 39 dBu contours, rather than their CGSA's, does not contravene the dictates of *Cellular Rulemaking*, and that the Commission could reasonably find that such a comparison adequately serves the public interest. We adhere to our holding in *Pittsburgh* that the parties to these comparative proceedings had adequate notice that their relative demand determination methodologies would be subject to comparative evaluation. Finally, we hold that the acceptance of one amendment upon a showing of good cause, rejection of another due to the absence of such a showing, and the denial of an inadequately supported request for cross-examination, did not work an abuse of discretion. We therefore conclude that the FCC's ultimate award in the Atlanta cellular market reflects reasoned decision-making which is adequately supported by the record.

Affirmed.

APPENDIX G

47 U.S.C. § 309:

Section 309.—(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commis-

sion of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under Section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under Section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to Section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of Section 308(a).

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding ninety days, and upon making

like findings may extend such temporary authorization for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under Section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act;

(3) every license issued under this Act shall be subject in terms to the right of use or control conferred by Section 706 of this Act.

(i) (1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) un-

less the Commission determines the qualifications of such applicant pursuant to subsection (a) and Section 308 (b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law—

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).

(3) (A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants of groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such

times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editoral control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission, not later than 180 days after the date of the enactment of the Communications Technical Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

47 U.S.C. § 402:

Section 402.—(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Chapter 158 of Title 28, United States Code.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as

to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties: filing of record. Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in Section 2112 of Title 28, United States Code [28 USCS § 2112].

(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by

a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) The court shall hear and determine the appeal upon the record before it in the manner prescribed by § 706 of Title 5, United States Code.

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 1254 of Title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal or by certification by the court pursuant to the provisions of that section.

No. 86-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC., CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

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QUESTION PRESENTED

Whether the Court below has fulfilled its primary responsibility of assessing the record to determine that the findings of the Federal Communications Commission are supported by substantial evidence in this *sui generis* case or, rather, has so far departed from the accepted and usual course of proceedings as to call for an extraordinary exercise of this Court's power of supervision.

LIST OF PARTIES
and
RULE 28.1 LISTING

No parties other than those in the caption appeared in the proceedings in the court below.[1]

The owners of Respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS") are LIN Broadcasting Corporation, which, through two wholly owned subsidiaries, owns 51 percent of the stock of AWACS, and Metromedia Company, a general partnership (successor in interest to Metromedia, Inc.), which owns 49 percent of the stock of AWACS.[2]

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[1] MCI Cellular Telephone Company and Unity Telecommunications Systems, Inc. also participated in the proceedings before the Federal Communications Commission.

[2] Petitioner Celcom Communications Corporation of Pennsylvania is wholly owned by Associated Communications Corporation. Respondent Cellular Mobile Systems of Pennsylvania is a general partnership which is owned 70 percent by Graphic Scanning Corp., through two wholly owned subsidiaries, and 30 percent by Unity Telecommunications Systems, Inc.

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IN THE

Supreme Court of the United States

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC.

The respondent Automatic Wide-Area Cellular Systems, Inc., ("AWACS"), respectfully requests that this Court deny the petition for a writ of certiorari filed by Celcom Communications Corporation of Pennsylvania ("Celcom"), seeking review of the opinion by the United States Court of Appeals for the District of Columbia Circuit in this case. *Celcom Communications Corp. of Pennsylvania v. FCC*, 792 F.2d 239 (D.C. Cir. 1986), *reh'g denied*, (Aug. 25, 1986).

STATEMENT OF THE CASE

On June 7, 1982, Petitioner Celcom Communications Corporation of Pennsylvania ("Celcom") and Respondent Automatic Wide-Area Cellular Systems, Inc. ("AWACS"), along with three other companies, filed with the Federal Communications Commission competing applications for the right to construct the nonwireline cellular telephone system to serve the Philadelphia, Pennsylvania market. At the time the applications were filed, an affiliate of LIN Cellular Communications, owner of 51% of the stock in AWACS, had an application before the Commission seeking authority to enter the Philadelphia paging market. The AWACS application disclosed also that its remaining stockholders, Radio Broadcasting Company ("RBC") and Metromedia, Inc. ("Metromedia"), had agreed that Metromedia would acquire RBC. RBC was already a major Philadelphia paging company. AWACS filed timely amendments to its cellular application to report that Metromedia and RBC had sought Commission consent to their proposed paging transaction and that the Commission, in February 1983, had granted such consent.

The cellular applications were designated for hearing in January 1983, and the hearing record was closed on May 13, 1983. During that period Celcom did not seek to present evidence concerning any potential adverse effects of the approved Metromedia acquisition of RBC. Celcom waited until more than ten months after the Commission approved that acquisition and more than three months after the issuance of the Administrative Law Judge's Initial Decision favoring AWACS, before it asked to reopen the record to consider its allegations that anticompetitive issues were presented by Metromedia's ownership of a paging company, LIN's potential entry into the paging market, and the ownership positions of those two companies in AWACS. Celcom claimed that it could not have advanced

its arguments until the purchase of RBC by Metromedia was consummated, although the purchase had been announced in AWACS' application and direct case.

The Commission rejected Celcom's request to reopen the record because, *inter alia,* it was untimely. (Celcom Petition, App. C at 38a). The Commission affirmed the Initial Decision granting the AWACS application after carefully weighing the various applicants in terms of the designated comparative criteria. It favored the AWACS application because of its thorough study of the market and implementation of the results of that study in designing its system and providing for expansion of the system.

Celcom was one of two unsuccessful applicants which sought review by the D.C. Circuit. The Court of Appeals affirmed the Commission's decision, finding that Celcom's attempt to reopen the record was untimely. That Court also rejected Celcom's argument that the cellular hearing process had become ineffectual because the Commission permits a winning applicant to make changes from its proposal to react to market demands. The Court of Appeals found generally that the argument was "without merit" (Celcom Petition App. A at 3a) and noted that it had already rejected a similar argument in reviewing another cellular case.

REASONS FOR DENYING THE WRIT

1. The issues in this case are *sui generis,* not of substantial national importance, will not have an impact on administrative law generally, and thus do not warrant review by the Court.

The contested license to provide a second cellular telephone service in the Philadelphia market offers a substantial opportunity to the prevailing applicant to render a public service and to profit thereby. This case was

decided by an Administrative Law Judge and was affirmed by the Commissioners of the Federal Communications Commission ("FCC" or "Commission") based upon standard comparative issues specially designed to award cellular licenses in the thirty largest markets. No basic qualifying issues were specified with regard to any applicant who pursued an appeal. The basic question decided in the hearing process was which of several established communications companies offered a plan calculated to provide the best cellular service to the Philadelphia area. There was no compelling national interest in the determination of the prevailing applicant.

Decisions with respect to twenty-five of the top thirty cellular markets have become final (several of the cases have already been reviewed by the Circuit Court). Apart from this case, only those cases listed in the margin are still being litigated,[1] the FCC having determined to award licenses for the smaller markets by lottery. Consequently, the specially designed comparative criteria and expedited hearing procedures for the award of cellular authorizations[2] were only utilized in the top-thirty cellular markets. Therefore, the Commission's application of those criteria cannot affect future applicants for cellular or any other type of FCC license award.

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[1] Pending appeals to the D.C. Circuit of cellular licensing decisions for other markets include: *Cellular Mobile Systems of Arizona, Inc. v. FCC*, No. 84-1542 (D.C. Cir. filed November 2, 1984); *Celcom Communications Corp. V. FCC*, No. 86-1621 (D.C. Cir. filed November 14, 1986); *MRTS-Poe of Tampa v. FCC*, No. 85-1328 (D.C. Cir. Filed June 4, 1985); *MRTS-Poe of Miami v. FCC*, No. 85-1329 (D.C. Cir. filed June 4, 1985), *motion to dismiss filed by appellant MRTS-Poe.*

[2] Petitioner did not timely challenge the formulation of these criteria and procedures which were adopted by the FCC following a rule-making proceeding.

Despite Petitioner's claims, no issues of far-reaching public importance are presented relative to the agency's decisional process. The issues in the case are *sui generis;* not of substantial national importance; and will not impact on administrative law generally. Review by this Court is not warranted.

2. The Court of Appeals fully considered and correctly decided the issues; Review by this Court is not warranted.

A. The Court of Appeals was correct in affirming the Commission's determination that Celcom was impermissibly late in raising its "anti-competitive practices" issue.

Celcom complains that the Commission and the Court of Appeals unfairly rejected its anti-competitive contention as untimely. Celcom's contention was based upon Metromedia's entrance into the Philadelphia paging market by virtue of its acquisition of Radio Broadcasting Company (RBC), an orginal AWACS stockholder. Celcom contended that this acquisition compromised paging business competition between Metromedia and the other AWACS stockholder, LIN[3] (Celcom Petition at 12-16). The Commission found, *inter alia,* that Celcom had attempted to raise the issue too late in the comparative proceeding. *Celcom Communications Corp. of Pennsylvania* ("Final Decision"), 58 Rad. Reg.2d (P&F) 1219, 1234 (1985) (Celcom Petition, App. C at 38a). The Court of Appeals in affirming noted that the proposed issue was not raised before the Administrative Law Judge or in Celcom's exceptions to the Initial Decision, but rather was raised belatedly while the Commission was deliberating

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[3]LIN was at the time of the RBC acquisition by Metromedia an applicant for paging facilities in Philadelphia.

with respect to its final decision. (Celcom Petition, App. A at 6a). Celcom has advanced no satisfactory reason why it could not have made its "anti-competitive concerns" arguments at hearing based on the proposal for Metromedia to acquire RBC which was expressly set forth in AWACS' application and direct case. (AWACS Direct Case at Ex. 1).[4] The analysis by the Court of Appeals of the timing question does not constitute a "novel doctrine of administrative procedure," as charged by Celcom. (Celcom Petition at 3).

Moreover, Celcom has never adequately explained why, by its own reasoning, it did not attempt to raise an issue with respect to its "anti-competitive concerns" which, presumably, were implicit in the original partnership between LIN and RBC.[5] At the time the applications were filed RBC was an established Philadelphia paging company and LIN was a proposed market entrant. Celcom contends that the situation was different because RBC "had only a passive role in the management of AWACS." (Celcom Petition at 4). The record does not support that contention, but, assuming *arguendo,* that Metromedia was to enjoy a greater role in management than RBC, the Stock Agree-

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[4] Celcom characterizes this as an uncertain "planned" acquisition. In fact, the agreement in principle concerning the proposal was referenced in the AWACS application. The filing and grant of the application for Commission consent were reported by amendments to the AWACS application. The new ownership arrangement was a part of AWACS' proposal from the inception of the hearing, yet Celcom did not advance its anti-competitive allegations. In contrast, the types of "speculative" issues which the Commission has refused to add to hearings, Celcom Petition at 14-15, n. 15, have concerned collateral matters, not specific application proposals.

[5] Celcom concedes that the anti-competitive issue, if timely added, "had to be weighed in the comparative evaluation." (Celcom Petition at 5). Its failure to seek addition of the issue in a timely manner, an omission which it has never fully explained, deprived the tribunal of the opportunity to include this factor in the balancing process.

ment expressly provided that RBC would assume a full role if the announced sale to Metromedia was for any reason not consummated within a specified three-year period. Celcom would have it both ways. It defends its failure to raise the anti-competitive issue based upon the RBC/LIN relationship on the claimed ground that it presumed that the sale of RBC to Metromedia would be closed and RBC would not assume a full management role in AWACS. Yet, at the same time it did not need to raise its issue with respect to Metromedia and LIN because it could not presume that the sale would be consummated. The issue, if there ever was one, was there from the inception of the Philadelphia proceeding. In view of this history, it can easily be inferred that Celcom just did not conceive of raising the issue until it saw that it was not winning the case. It merely used the consummation of the Metromedia-RBC transaction as a pretext to attempt to reopen the record with further argument.

In sum, comparative hearings are by their nature predictive of future performance, and if Celcom wanted to marshall evidence bearing on the prediction of AWACS' performance it should have done so at the outset of the hearing, based on the clear ownership proposal set forth in AWACS' application.

Contrary to Celcom's assertions, there are no novel questions of law lurking in this case that would affect administrative law generally. Celcom's "Catch-22" argument (Celcom Petition at 12) does not serve as a basis for granting the writ. The requirement that litigants are to advance arguments in a timely fashion has long been a hallmark of both general civil and administrative law. Celcom's reasoning would require this Court to engage in myriad factual determinations as to the appropriate time for advancing new issues in administrative proceedings.

This question is best left to an initial determination by the administrative agencies, which are properly supervised by reviewing courts. The Court of Appeals was correct in affirming the Commission's ruling that Celcom had an obligation to come forward with its "theory" much earlier in this expedited proceeding on a timely basis. (Celcom Petition, App. A at 6a). In any event, this Court has accorded the Commission wide latitude in establishing its procedures, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and Celcom's procedural argument raises no issue warranting this Court's review.

B. The Court of Appeals was correct in rejecting Celcom's contention that the Commission made its choice without meaningful consideration of its announced comparative criteria.

Contrary to Celcom's contentions, the Court of Appeals did not permit the Commission to depart unlawfully from its earlier formulated comparative criteria for deciding the top-thirty cellular cases. (Celcom Petition at 16-25). While the Commission refined its application of those criteria during its consideration of earlier cases, the issues on which the Commission's decision was based were basically the same issues originally designated as a result of its rule-making proceedings. The quality of market research was indeed critical to evaluation of those issues, but only insofar as it correlated with proposed cellular system design. The Commission noted specifically in affirming the Initial Decision that the Administrative Law Judge had

> found AWACS' market analysis more reliable than those of the other applicants and that AWACS used this information in designing a demand-based cellular system.[6]

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[6] *Final Decision* (Celcom Petition, App. C at 17a). The Commission stated that "[i]n contrast, the judge found Celcom's public need showing patently defective and its overall market study so inadequate as not to warrant comparative consideration." The Commission agreed. *(Id.* at 19a).

It found that AWACS "could best be relied upon for designing a cellular system responsive to the particular needs of the Philadelphia market." *(Id.* at 18a). With respect to "accommodation of demand," the Commission found that:

> The critical factor in this comparative issue is the demonstration of a nexus between the demand survey/market research conducted by the applicant and its cellular system design. The judge's conclusion that AWACS system design is based on the results of its market research is supported by the record and is reasonable.

(Id. at 22a). Again, with respect to the "expansion plan" criterion,[7] the Commission found that AWACS' market research had been translated into a "well-developed, market-specific expansion plan." *(Id.* at 28a). Without venturing further into the merits of the case, it may be seen that Celcom is fundamentally mistaken in its contention that the Commission's decision was based solely on an evaluation of market research without due regard to the proposed implementation of that research through system design. The basic decisional criteria employed by the Commission in this case were in fact those which it had announced in its rulemaking proceeding and specified in the Hearing Designation Order. On virtually all major issues, AWACS demonstrated the superiority of its proposal over those of the other applicants, including Celcom. The decision of the Court of Appeals affirming the Commission was clearly supported by the record.

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[7] Application of this criterion by the Commission had been affirmed by the Court of Appeals in the two lead cellular cases. *Cellular Mobile Systems of Illinois, Inc. v. FCC*, 782 F.2d 214 (D.C. Cir. 1985) (Chicago) and *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182 (D.C. Cir. 1985) (Pittsburgh). Consequently, Celcom's excursion into this area of the decisional process presents nothing novel which would warrant grant of its petition.

The citation by the Court of Appeals to its decision in the Atlanta cellular case, *Celcom Communications Corp. of Georgia v. FCC,* 787 F.2d 609 (D.C. Cir. 1986) (Celcom Petition, App. F at 51a), properly and thoroughly disposed of Celcom's contention that the Commission had undercut its decisional criteria by permitting the eventual cellular licensees freedom to modify their proposals to respond to market conditions. The Commission has made reasoned decisions among competing applicants based on their proposals to provide service, but wisely has permitted its licensees a degree of latitude in implementing those proposals for this new service involving new technology. Celcom provides no basis, however, for its allegation that licensees are free to depart substantially from those aspects of their proposals relied upon by the Commission in awarding a license.

Celcom argues that the Commission's statements made generally with respect to the cellular hearing process and permissible changes in cellular systems had undercut the public interest benefit of the comparative process. (Celcom Petition at 18.) The Court of Appeals without specific discussion rejected this contention along with other issues raised by Celcom that had "already been resolved in previous cellular telephone appeals [footnote omitted] or otherwise are without merit." (Celcom Petition, App. A at 3a). In *Atlanta,* one of the cited cases, the Court of Appeals had expressly found that the Commission's allowance to cellular licensees of some flexibility in implementation of proposals was consistent with application of the cellular hearing criteria. *Celcom Communications Corp. of Georgia v. FCC,* 787 F.2d 609 (D.C. Cir. 1986) (Celcom Petition, App. F at 55a). While Celcom claims that it was unfairly prohibited from raising problems with the implementation of the hearing criteria, the Court of Appeals found that the implementation was consistent with the original rule making and that "Celcom's creative analysis, when fairly viewed, mischaracterizes the FCC's position." *Id.* (Celcom Petition, App. F at 54a).

This case is now five years old. Celcom has in fact been afforded the very review which it claims it was denied and it is merely unhappy with the proper evaluation and disposition of its claims. Inasmuch as Celcom did not (and indeed could not) show the Court of Appeals that the Commission had departed from its comparative criteria, its contention that the Court of Appeals should not have noted that Celcom could have complained about those criteria earlier is merely academic.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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January 23, 1987

No. 86-830

In the Supreme Court of the United States

OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner, an unsuccessful applicant for a license to operate a cellular telephone system in Philadelphia, challenges the court of appeals' per curiam decision affirming the Federal Communications Commission's denial of the license. Petitioner challenges the court's holding that one of petitioner's arguments was untimely and argues that the court erroneously declined to consider petitioner's challenge to the application in this case of the regulations that governed the license proceeding.

1. a. In May 1981, respondent Federal Communications Commission established by regulation a comparative hearing process to consider competing

applicants for licenses to operate "non-wireline" cellular telephone systems. *Cellular Communications Systems*, 86 F.C.C.2d 469 (1981), modified, 89 F.C.C. 2d 58, further modified, 90 F.C.C.2d 571 (1982), petition for review dismissed, No. 82-1526 (D.C. Cir. Mar. 3, 1983). The Commission rejected the alternative of selection by lottery, though it recognized that experience might show that a lottery method might have advantages. 86 F.C.C.2d at 498-499. In order to make cellular telephone service available to the public as rapidly as possible, the Commission adopted streamlined procedures for the top thirty metropolitan areas. *Id.* at 498-501.

The licensing process for the top thirty markets began in June 1982 and moved ahead rapidly. In May 1984, the Commission concluded—based on its experience with these hearings, the large number of applicants for licenses in the smaller markets, the need to expedite licensing, and the burdens of comparative hearings—that licensees should be selected by lottery for markets other than the top thirty. *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175 (1984), modified, 101 F.C.C.2d 577, further modified, 50 Fed. Reg. 51522 (1985), petition for review pending *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, No. 85-1322 (D.C. Cir. filed June 3, 1985). The Commission retained the comparative hearing process for the top thirty markets because, the process having come so far, the savings from using a lottery were insufficient to warrant abandonment of the comparative process. 98 F.C.C.2d at 179 n.12; see *Celcom Communications Corp.* v. *FCC*, 787 F.2d 609, 612 (D.C. Cir. 1986) (Pet. App. 55a-56a).

b. The proceeding at issue in this petition began on June 7, 1982, when competing applications for the non-wireline license in Philadelphia (one of the top

thirty metropolitan areas) were filed by petitioner, by respondent Automatic Wide Area Cellular Systems, Inc. (AWACS), and by three other companies that have not sought review. On January 21, 1983, a hearing was scheduled, and the issues for hearing were designated. Rebuttal papers were filed in March; hearings were held in late April and early May; and post-hearing briefs were filed in June 1983. The administrative law judge released his decision (the Initial Decision), awarding the license to AWACS, in September 1983. That decision was affirmed, with modifications, by the full Commission in a decision released January 8, 1985. Pet. App. 8a-40a. The Commission denied reconsideration in a decision released August 22, 1985. *Id.* at 41a-49a.

c. Among the arguments petitioner made to the full Commission was one concerning the relations of AWACS' three owners—LIN Cellular Communications (LIN), which owned 51%; Metromedia, Inc (Metromedia), which owned 25%; and Radio Broadcasting Company (RBC), which owned 24%. RBC played a major role in the Philadelphia paging ("beeper") market; and LIN had pending before the FCC an application to enter that market. At the time the cellular license applications were filed, as AWACS' application disclosed, Metromedia and RBC had agreed that Metromedia would acquire RBC. If LIN's paging application and the Metromedia-RBC combination were both approved, the result would be that Metromedia and LIN would be cooperating as co-owners of AWACS while competing in the paging market.

The Commission approved Metromedia's acquisition of RBC in a decision released February 11, 1983 —less than one month after the Philadelphia cellular

proceeding had been designated for hearing. Petitioner, although allegedly concerned about the potential for anticompetitive effects in the paging market of allowing Metromedia and LIN to cooperate in the cellular market, did not raise those concerns in its rebuttal papers (March 1983), at the hearings (April and May), in its post-hearing briefs (June), or in its Exceptions or Reply Exceptions seeking review of the September 1983 Initial Decision before the full Commission. On January 3, 1984, more than ten months after the Commission approved Metromedia's acquisition of RBC, petitioner raised this challenge to the AWACS license award in a motion to reopen the proceeding. The Commission rejected petitioner's request to reopen the record because, inter alia, it was untimely (Pet. App. 38a).[1]

d. In the court of appeals, petitioner challenged the FCC denial of its license applications on numerous grounds. The court affirmed the Commission ruling in a brief per curiam decision. Pet. App. 1a-6a. The court rejected all but two of the challenges, without additional discussion, as already having been resolved in other cellular telephone cases, including *Celcom Communications Corp.* v. *FCC*, *supra*, or as "otherwise * * * without merit" (Pet. App. 3a). The court also rejected petitioner's extensive arguments, which are not pressed in this Court, challenging the FCC's reliance on AWACS' market study in concluding that AWACS was superior to its competi-

[1] The Commission noted that petitioner was well aware of the relationship between Metromedia and LIN at the time the FCC approved the acquisition, "but [petitioner] did not object to the Metromedia acquisition. [Petitioner's] objection here is both late and filed in the improper forum" (Pet. App. 38a).

tors in its assessment of anticipated demand. *Id.* at 3a-5a. Finally, the court affirmed the FCC's refusal, on timeliness grounds, to hear petitioner's allegation of anticompetitive potential inherent in the Metromedia-RBC combination. *Id.* at 5a-6a, 7a.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, although four appeals from cellular licensing decisions are pending in the District of Columbia Circuit, the FCC has completed all cellular comparative hearings, and the court's ruling therefore is unlikely to affect the future selection of cellular licensees or other FCC proceedings. Accordingly, there is no basis for further review.

a. Petitioner first argues (Pet. 12-16) that the court of appeals erred in holding untimely petitioner's January 1984 motion to reopen the administrative proceeding for consideration of the anticompetitive effects that the Metromedia-RBC combination might have in the paging market. Petitioner contends that its motion was timely because Metromedia's acquisition of RBC was not actually consummated until early December 1983. Petitioner cites no judicial support for this contention, however, and the court of appeals correctly rejected it.

Metromedia's proposed acquisition of RBC was well known to petitioner from the outset of the cellular proceeding. The AWACS application in June 1982 described the proposed combination, and the LIN application to enter the paging market was a matter of public record throughout the proceeding below. Thus, petitioner could have, and should have, raised the issue no later than in its rebuttal papers filed prior to the hearing. Even if we assume, however, that petitioner might be excused from raising

the anticompetitive-effects issue until the FCC decided whether to approve the Metromedia-RBC transaction, petitioner's challenge was still inexcusably late. The Commission's approval was announced in February 1983. Yet petitioner remained silent for more than ten months, saying nothing until after the adverse Initial Decision. Petitioner inexcusably failed to raise the issue in its rebuttal papers, at the administrative hearing, in its post-hearing briefs, or even in its Exceptions and Reply Exceptions to the administrative law judge's decision.

Nothing about the actual consummation of the Metromedia-RBC acquisition altered the issues petitioner wanted the FCC to explore in the cellular comparative hearing—the potential anticompetitive effects in the paging market of allowing two competitors in that market to operate a joint venture in the cellular market. First, only RBC (and not Metromedia) was active in the paging market, and LIN and RBC were joint stockholders in AWACS from the start; thus, the alleged threat to competition existed even prior to Metromedia's acquisition of RBC. In any event, as far as the petition reveals, all the facts relevant to the inquiry into competition in the paging market were known prior to consummation of the purchase. Finally, even if the closing of the deal raised some new issues, the question of anticompetitive potential in the paging market was clearly ripe for consideration prior to the closing: once the proposed acquisition was announced, and certainly after it was approved by the FCC, a full exploration of petitioner's concerns about competition in the paging market was possible.

There was especially strong reason to insist on prompt raising of relevant issues in this cellular comparative proceeding. Cellular radio is a new form of

mobile communications that makes it possible to meet a greatly increasing demand for mobile telephone service. See *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 634-639 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Recognizing that "it is high time to move cellular telephone services from the FCC's regulatory process to the marketplace" (*MCI Cellular Telephone Co.* v. *FCC*, 738 F.2d 1322, 1328 (D.C. Cir. 1984)), the Commission adopted special expedited hearing procedures for choosing among mutually exclusive cellular applicants. *Cellular Communications Systems*, 86 F.C.C.2d at 498-501. Petitioner's "wait-and-see" strategy with respect to raising its concerns about the Metromedia-RBC acquisition, if accepted by the Commission, would have further delayed introduction of a competitive nonwireline cellular system in Philadelphia. In these circumstances, petitioner's waiting for the consummation of the Metromedia-RBC combination is nothing more than an excuse for having attempted to interject a new issue into a comparative proceeding that was not going its way, and the court of appeals' rejection of this effort as untimely was correct.

In any event, a remand to the Commission to consider the effects on competition in the Philadelphia paging market of the AWACS license award would now be pointless. LIN has divested itself of any interest (including its Commission license) in the paging market in the Northeast Corridor, which includes Philadelphia. See *In re Celcom Communications Corp.*, FCC 86-423 (Oct. 16, 1986), slip op. 4 n.31. Thus, LIN is no longer even a potential competitor of Metromedia, and petitioner's challenge is moot.

b. Petitioner also argues (Pet. 16-25) that the court of appeals erroneously refused to consider its

challenge to the application of the comparative criteria in this proceeding. This argument simply mischaracterizes the court's ruling.

Petitioner does not challenge the validity of the regulations that established the criteria that were to govern the licensing proceedings (Pet. 17). Rather, petitioner challenges the license decision here as not consistent with the public interest because the regulatory criteria have allegedly been "eroded" by the Commission (*ibid.*). The petition appears to identify—and in the court of appeals petitioner identified—only two ways in which this erosion has allegedly occurred: since promulgation of the comparative criteria, petitioner argues, the Commission has (i) decided not to hold licensees to the plans they submit in the licensing process and (ii) effectively confessed the irrationality of the comparative criteria, as evidenced by the Commission's adoption of a lottery method for awarding licenses in markets other than the top thirty.

These arguments, however, are precisely what the court of appeals rejected on the merits in *Celcom Communications Corp.* v. *FCC*, 787 F.2d at 611-612 (Pet. App. 54a-56a) (the *Atlanta* case). The court there held that the Commission had not departed from the original regulatory criteria governing post-award alteration of licensees' plans (787 F.2d at 612 (Pet. App. 55a))—so that this argument is really a challenge to the original criteria, a challenge petitioner here disavows. The court also held that the Commission's adoption of a lottery selection process merely reflected a new weighing of the costs and benefits of a comparative hearing process, not an abandonment of the belief that the hearing process was capable of "identifying the best applicant in the larger markets" (*ibid.* (Pet. App. 56a)).

As petitioner acknowledges, the court of appeals' rejection of its challenge to the application of the comparative criteria in this proceeding was included in the court's simple statement that "[m]ost of the arguments made by [petitioner] * * * focus on issues that have already been resolved in previous cellular telephone appeals or are otherwise without merit" (Pet. App. 3a). The court cited the *Atlanta* case in this reference to previous decisions (Pet. App. 3a n.1). Because the argument petitioner makes is precisely the same as the argument made and rejected on the merits in the *Atlanta* case, it is clear that the court of appeals' citation of the *Atlanta* case here was a rejection of the argument once again on the merits. In any event, even if the court did not intend to include this challenge among those already "resolved in previous cellular telephone appeals," this challenge falls within the remaining group expressly found "without merit." Accordingly, there is no basis for petitioner's contention that the court of appeals refused to consider the claim on the merits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 86-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents FCC and Automatic Wide-Area Cellular Systems, Inc. ("AWACS") have skirted, not answered, the difficult questions presented in the Petition.

1. Respondents label this case undeserving of review because cellular comparative proceedings are a vanishing breed. FCC Memo at 5; AWACS Br. at 4. But the issues presented by Petitioner are *not* limited to cellular radio cases. They have scope and importance for numerous proceedings before the FCC and other agencies.

Respondents have not shown that the important administrative procedural issues identified by Petitioner are confined to cellular comparative proceedings. Nor

could they. The D.C. Circuit's "tardiness doctrine" could create chaos and condone unfairness in *any* agency case involving the decisional significance of a pending or proposed, but not-yet-consummated, transaction. There will surely be many such cases. Moreover, the D.C. Circuit's "rulemaking appeal doctrine," by precluding review of the application of agency rules, procedures and policies in later adjudicatory cases if the rules, procedures and policies were not directly appealed at the time of their adoption, is clearly applicable to a wide range of FCC and other agency proceedings. The "rulemaking appeal doctrine" could insulate arbitrary and irrational agency adjudicatory action from judicial review in the many FCC and other agency cases that apply earlier-promulgated rules, procedures and policies to an individual applicant which has not itself appealed their adoption. The Commission's cellular comparative hearing proceedings may be nearing an end, but the harm created by the D.C. Circuit's rulings will endure and be applied to other kinds of cases unless they are reviewed and reversed by this Court.

2. Respondents' contention that Petitioner was late in raising the anticompetitive issue is erroneous because Metromedia's acquisition of RBC was not a "fact" until the deal was consummated. Had Petitioner raised the anticompetitive issue on the basis of AWACS' earlier disclosure of a mere *proposed* transaction, or even on the basis of the Commission's approval of that proposal, Petitioner surely would have been rejected as being speculative and premature.[1]

Respondents argue that RBC was from the outset both a participant in the AWACS cellular venture and a dominant paging competitor. Therefore, Respondents reason, RBC's acquisition by Metromedia was not the significant event that Petitioner claims, because it merely

[1] The FCC's trial staff even opposed Petitioner's post-consummation motion to reopen as speculative and premature!

substituted Metromedia for RBC as a potentially anti-competitive collaborator with Lin, without changing the nature of the anticompetitive risks.[2] FCC Memo at 6; AWACS Br. at 6. But Respondents' argument founders on the simple fact that Lin could not have been required to collaborate closely with RBC. Only Metromedia, not RBC, had a power of negative control of the AWACS venture. By virtue of Metromedia's role as the source of all of the capital for the AWACS venture, Lin was required as a practical matter to collaborate and achieve consensus with Metromedia even though Lin held a 51 percent share. No such collaboration would have been necessary between Lin and RBC.[3]

Respondent FCC, here conceding that the *consummation* of the Metromedia-RBC deal may have "raised some new issues," nonetheless urges that it was proper to have held Petitioner untimely because provision of cellular service to the public needed to be on a fast track, and consideration of Petitioner's anticompetitive argument stood in the way of expedition. FCC Memo at 6-7.[4] The

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[2] Respondents' argument was not relied upon either by the Commission or the D.C. Circuit.

[3] No collaboration between Lin and RBC would have been necessary even if the Metromedia acquisition had never occurred. The "full role" for RBC contemplated by the AWACS agreement in the event Metromedia's acquisition was not consummated (AWACS Br. at 6-7) would not have resulted in close collaboration between Lin and RBC because Lin would still have had the controlling 51 percent interest and RBC would have had no countervailing power under the agreement similar to Metromedia's.

[4] The agency's decision relied on no such reasoning. The agency held Celcom untimely for failing to raise the anticompetitive issue in the separate proceeding to approve the RBC acquisition. Pet. App. 38a. This rationale was not the one ostensibly "affirmed" by the D.C. Circuit. Respondent FCC glosses over this problem, while Respondent AWACS disingenuously states that the D.C. Circuit "affirm[ed] the Commission's ruling that Celcom had an obligation to come forward . . . much earlier in *this* . . . expedited proceeding",

expedition argument here is laughable, for the Commission sat on Celcom's motion to reopen for more than a year. In any event, agencies may not cut corners in the interests of expedition, where, as here, such short cuts disregard matters at the heart of their statutory mandate.

Nor is there merit to Respondent FCC's assertion that this case now is moot. FCC Memo at 7. The authorities cited by Respondent FCC to show that Lin has divested itself of paging interests refer only to the *New York* market and do not concern Lin's status as a potential paging competitor in the *Philadelphia* market. *See Page Boy, Inc.*, FCC Mimeo 5432 (June 27, 1986), *cited in Celcom Communications Corp.*, FCC 86-423 at 4, n.31 (Oct. 16, 1986). In any event, the Commission's cellular comparative hearing rules forbid "one-upsmanship" in the form of upgrading amendments, *see, e.g., Cellular Systems (Reconsideration)*, 89 F.C.C.2d 58, 89 (1982), so that AWACS' anticompetitive problems could not have been cured by any divestiture after designation for hearing.[5]

3. Respondents miss the point of Petitioner's argument that the Court of Appeals erroneously refused to review the application of FCC rules, procedures and policies to Petitioner's Philadelphia application.[6] In the D.C.

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and urges the Court to accord "wide latitude" to the agency's "initial determination" of the procedural question. AWACS Br. at 8 (emphasis added). In fact, the D.C. Circuit's error is compounded because it has ignored the agency's procedural ruling and created a new one, contrary to FCC v. Schreiber, 381 U.S. 279, 290 (1965).

[5] AWACS has not claimed mootness here.

[6] Respondent AWACS mischaracterizes Petitioner's point as a complaint about the D.C. Circuit's approval of a "depart[ure]" by the FCC from its original regulatory criteria (AWACS Br. at 8). This is not Petitioner's argument. AWACS also argues that the preferences awarded to it by the FCC reflected reasoned decision-

Circuit Petitioner attacked the irrationality of the Commission's continuing to award preferences for application proposals after it had disclaimed any interest in whether applicants would actually implement their proposals. The court's response was merely the citation of the court's *Atlanta* decision.[7] Respondent FCC misconstrues Petitioner's argument before this Court by casting it as a complaint that the Court of Appeals did not address this point *at all*. FCC Memo at 8-9.

Contrary to Respondent FCC's contention, mere cita tion of the *Atlanta* case was *not* "a rejection of the argument once again on the merits." FCC Memo at 9. The *Atlanta* decision never addressed the *merits* of the challenge made to the public-interest emptiness of the comparative preferences. Instead, the Court of Appeals said in *Atlanta* merely that substantive review of the point was foreclosed because there had been no appeal of the original cellular rulemaking adopting the rules, procedures and policies that were to govern cellular comparative proceedings. Pet. App. 55a. Petitioner's point here is that the *Atlanta* decision was fundamentally wrong, so that it was also fundamentally wrong to apply it in this *Philadelphia* case. Petition at 16-25.

Respondent FCC fails to defend the *Atlanta* decision; its memorandum appears instead to assume that, because the Philadelphia case was merely an application of the *Atlanta* precedent, there is no basis for this Court's review. This attempt to short-circuit this Court's supervisory powers must fail: the Court has the power to review the Philadelphia decision *and* to pronounce unsound the *Atlanta* reasoning on which the Philadelphia

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making. Such arguments are irrelevant, given the D.C. Circuit's reliance on the *Atlanta* precedent, which pretermitted review of the rationality of the preferences.

[7] Celcom Communications Corp. of Georgia v. FCC, 787 F.2d 609 (D.C. Cir. 1986), Pet. App. 51a-64a.

decision relies. That is what Petitioner has asked the Court to do.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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